RIVERSIDE COALITION OF BUSINESS PERSONS AND LANDLORDS, RUTH MARINO, and JOHN DOE 1,	:	**SUPERIOR COURT OF NEW JERSEY BURLINGTON COUNTY LAW DIVISION**
Plaintiffs,	:	**DOCKET NO. BURL-L-2965-06**
v.	:	
TOWNSHIP OF RIVERSIDE,	:	
Defendant.	:	

BRIEF IN SUPPORT OF ORDER TO SHOW CAUSE AND APPLICATION FOR INJUNCTIVE RELIEF TO ENJOIN THE RIVERSIDE TOWNSHIP ILLEGAL IMMIGRATION RELIEF ACT ORDINANCE

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PRELIMINARY STATEMENT

This matter arises upon an Order to Show Cause filed by plaintiffs Riverside Coalition of Business Persons and Landlords, Ruth Marino, and John Doe 1, against the Township of Riverside (hereinafter "the Township" or "Riverside"), seeking declaratory and injunctive relief, exclusively on state law grounds, to invalidate and preliminarily and permanently enjoin Ordinance 2006-26, the "Riverside Township Illegal Immigration Relief Act Ordinance," (hereinafter "the Revised Riverside Immigration Ordinance") (Exhibit "A").[1] The Ordinance represents the third attempt by Riverside to ban immigrants from renting, residing, or being employed in the Township. Without offering any credible definition of the term "illegal alien" or any established procedure as to how that status is to be determined by Township officials, the Ordinance makes it unlawful for any property owner to rent, lease, or permit the occupancy of any property by an "illegal alien." The Ordinance also makes it unlawful or for any entity to recruit, hire, dispatch, instruct or continue to employ any person who is an "unlawful worker" in the Township. Violations of the Ordinance result in the immediate suspension of a business and/or rental license without a hearing, and a dwelling unit owner faces fines of one thousand ($1,000) to two thousand ($2,000) dollars; a term of imprisonment or period of community service not exceeding ninety (90) days; and loss of any Township contracts or grants.

The Revised Riverside Immigration Ordinance suffers from multiple infirmities, each of which entitle plaintiffs to injunctive relief, including the following:

a. The Ordinance is *ultra vires* under state law, as the Township, which may only exercise those powers conferred upon it by the New Jersey Legislature, lacks the power and

[1]Copies of all of the lettered exhibits are attached to plaintiffs' Amended Verified Complaint filed herewith. "VC" refers to plaintiffs' Amended Verified Complaint, followed by the paragraph number.

authority to ban a class of housing occupants, deny an owner a substantial attribute of ownership and possession of real estate, or regulate the hiring decisions of all businesses in the Township based upon employee immigration status.

b. The Ordinance is unlawful as it is preempted under state law, because it interferes with the New Jersey Anti-Eviction Act, N.J.S.A. 2A:18-16.1, *et seq.*, the state statute enacted to exclusively govern eviction of tenants; the Local Public Contracts Law, N.J.S.A. 40A:11-1 to 56, the state law which establishes a comprehensive procedure for the award of certain local public contracts; the New Jersey Licensing statutes, N.J.S.A. 40:52-1 *et seq.*, and N.J.S.A. 34:2-21.1, which governs the employment of child labor in New Jersey.

c. The Ordinance is void for vagueness under Article I, paragraph I of the New Jersey Constitution. Since the Revised Riverside Immigration Ordinance, which includes penal consequences, does not define the term "illegal alien;" enumerate what immigrant identity information must be supplied by businesses and landlords subject to the Ordinance; explicate what businesses or property owners must do to correct any alleged violations under the Ordinance to avoid sanctions; and/or does not promulgate guidelines for its implementation, it fails to afford a person of ordinary intelligence fair warning of what conduct is prohibited, or specific enough standards for its enforcement, and is violative of fundamental principles of due process.

d. The Ordinance violates Article I, paragraph 1 of the New Jersey Constitution, by subjecting numerous non-citizens to deprivations of liberty and property without any established procedure, and subjecting landlords and businesses to the immediate loss of rental licenses and business permits respectively, and income, without the benefit of any established procedure in advance of or subsequent to the imposition of such sanctions. Further, it places landlords, employers

and business owners in the untenable position of being obligated, without any standards, to demand proof of status for every suspected "illegal alien" to avoid the risk of imprisonment, fines and loss of municipal businesses, or alternatively, to deny services to lawful residents as a precaution to avoid transgressing the Revised Riverside Immigration Ordinance, thereby risking violation of federal and state anti-discrimination laws.

e. The Ordinance violates the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 *et seq.*, and the equal protection provisions of Article I, paragraph I of the New Jersey Constitution, as it permits complaints based in part upon race.

The Revised Riverside Immigration Ordinance, born from fear and nurtured by prejudice, is blatantly unlawful and unconstitutional. As demonstrated in this brief, the plaintiffs are entitled to equitable relief, permanently enjoining and invalidating the Revised Riverside Immigration Ordinance, and costs and attorneys' fees for filing this action.

PROCEDURAL HISTORY

On or about July 26, 2006, Riverside enacted Ordinance 2006-16, entitled "Riverside Township Illegal Immigration Relief Act" (Exhibit "B") (hereinafter referred to as "Initial Riverside Immigration Ordinance"). This Act was subsequently amended on or about August 23, 2006 by Ordinance 2006-18 (Exhibit "C") (hereinafter referred to as "Amended Riverside Immigration Ordinance").

On September 25, 2006, counsel for plaintiffs Marino and the Coalition sent a demand letter to then- Mayor Charles Hilton and the Township Council, citing several of the legal problems with Riverside's Initial and Amended Immigration Ordinance and urging the Township to rescind it (Exhibit "D").

When the Township refused, on or about October 18, 2006, plaintiffs filed a five-count Verified Complaint, Order to Show Cause, brief in support thereof, and brief in support of plaintiff John Doe to prosecute this action under a pseudonym. Plaintiffs sought declaratory and injunctive relief to invalidate and preliminarily and permanently enjoin the Initial and Amended Riverside Immigration Ordinances, which represented an unprecedented attempt by the Township to ban immigrants from renting, residing, using property, or being employed in the Township. The matter was assigned to the Honorable John Sweeney, A.J.S.C.

In lieu of executing plaintiffs' Order to Show Cause, on October 25, 2006, Judge Sweeney, A.J.S.C., entered a Consent Order, agreed to by counsel, which provided that the Township would not enforce the Initial Riverside Immigration Ordinance or any amendment thereto, without first affording plaintiffs' counsel at least twenty-four days written notice that the Township intended to enforce the Ordinance or any replacement thereto (Exhibit "E").

On the same day that this Order was signed, the Township introduced for its first reading, and on November 22, 2006, the Township enacted the Revised Riverside Immigration Ordinance, designated as Ordinance 2006-26 (copy attached hereto as Exhibit "A"). The Ordinance was based upon a similar ordinance which was enacted in Hazleton, Pennsylvania. The Hazleton ordinance, which has subsequently been further amended, is presently subject to a temporary restraining order and the subject of ongoing litigation in the United States District Court for the Middle District of Pennsylvania, captioned as *Lozano v. City of Hazleton,* Civil Action No. 3:06-cv-01586 (Hon. James M. Munley).[2]

[2]The Revised Riverside Immigration Ordinance is similar to other anti-immigrant local ordinances enacted around the country which have been drafted, strongly advocated for and "shopped" by an anti-immigration organization in Washington, D.C. Analogous ordinances have been enacted in Hazleton, Pennsylvania; Escondido, California; Valley Park, Missouri; Farmers Branch, Texas; and Cherokee County, Georgia. The United States

On November 18, 2006, the defendant in this case removed this matter to the United States District Court for the District of New Jersey, claiming that plaintiffs' Complaint raised a substantial question of federal law. On November 21, 2006, plaintiffs' counsel wrote to defendant's counsel and stressed that there is no basis for removal and requested that the defendant voluntarily remand the matter to state court. The Township refused.

On February 23, 2007, after oral argument, the Honorable Renee Bumb remanded this matter to this Court (copy of the remand decision Exhibit "H"). Since the defendant has refused to rescind the Revised Riverside Immigration Ordinance, plaintiffs have no choice but to proceed with the instant action.[3]

District Court for the Southern District of California granted a temporary restraining order enjoining the Escondido Ordinance, 465 F.Supp. 2d 1043 (S.D. Cal. 2006), and subsequently entered a permanent injunction against the Escondido Ordinance with the agreement of the parties (Exhibit "F"). The United States District Court for the Middle District of Pennsylvania granted plaintiffs' motion to temporarily restrain the ordinance in Hazleton, pending the outcome of the just completed hearing. *See e.g., Lozano v. City of Hazleton*, 2006 U.S. Dist. LEXIS 79301 (M.D. Pa. October 31, 2006). The state court in Missouri granted a temporary restraining order enjoining enforcement of the City of Valley Park Ordinance, and recently granted plaintiffs' motion for judgment on the pleadings to enjoin that ordinance (Exhibit "G"). The parties in Cherokee County stipulated that the Ordinance would not be enforced pending completion of that litigation (Exhibit "L").

[3]Complaints challenging the constitutionality of a municipal ordinance are maintainable either as declaratory judgment actions, *Bell v. Township of Stafford*, 110 N.J. 384, 390-91 (1988), or as actions in lieu of prerogative writs, *Hills Dev. Co. v. Township of Bernards*, 103 N.J. 1, 44, 45 (1986). "If viewed as declaratory judgment actions, plaintiffs' constitutional claims would not be subject to the time limit on actions in lieu of prerogative writs imposed by R. 4:69-6(a). Moreover, the Declaratory Judgment Act, N.J.S.A. 2A:16-50 to 62, does not contain a statute of limitations." *Ballantyne House Associates v. City of Newark*, 269 N.J. Super. 322, 331 (App. Div. 1993). *Cf. Asbury Park Press, Inc. v. Woolley*, 33 N.J. 1, 14-15 (1960). If viewed as actions in lieu of prerogative writs, plaintiffs' constitutional claims would be subject to the forty-five day limitations period of R. 4:69-6(a), but this limitation may be enlarged under R. 4:69-6(c) "where it is manifest that the interest of justice so requires." "Actions in lieu of prerogative writs challenging the constitutionality of municipal ordinances have long been afforded the benefit of such enlargements of time." *See Ballantyne House*, 269 N.J. Super. at 331; *Brunetti v. Borough of New Milford*, 68 N.J. 576, 585-88 (1975); *Ocean County Board of Realtors v. Borough of Beachwood*, 248 N.J. Super. 241, 239-240 (Law Div. 1991). In this case, plaintiffs are challenging the validity of the Riverside ordinance on its face pursuant to N.J.S.A. 2A:16-50 *et seq.* and thus not limited by the 45 day time requirements of *R.* 4:69-6(a). Since this Court did not have jurisdiction over this matter until February 23, 2007, and even after that, plaintiffs were still hopeful that the Township would rescind the Ordinance, the period should not even begin to run until the middle of March of 2007, when it became clear that the municipality would not alter its stance.

STATEMENT OF FACTS[4]

The Riverside Coalition of Business Persons and Landlords (hereinafter "the Coalition") is an unincorporated association comprised of landlords and employers, all of whom either operate businesses, some of which employ persons in Riverside, or rent or lease property to tenants in the Township. Some members of the Coalition are required to obtain business permits to operate their business or rental licenses to lease property, and all are subject to loss of income, potential fines or imprisonment for violation of the terms of the Riverside Ordinance (VC ¶1).

Plaintiff Ruth Marino is a landlord who owns and leases multiple residential properties to tenants in Riverside, New Jersey (VC ¶2).

It is hard, if not impossible, for plaintiffs Marino and the Coalition and its members to determine whether their tenants or employees are "illegal aliens" under the Ordinance. There is no definition of "illegal aliens" under the Ordinance, none of the landlords or employers have received any guidance or training from the Township regarding how to determine whether an individual is an "illegal alien," and they have no expertise in applying immigration law, making immigration status determinations or determining the authenticity of immigration-related documents (VC ¶3).

Plaintiff John Doe 1 (hereinafter "plaintiff Doe") is a Latino immigrant who resided as a tenant with his family in a multi-family home in Riverside for several years. Plaintiff Doe is extremely concerned about being able to maintain a place to live in Riverside as a result of the passage of the Riverside ordinance. Immediately after its adoption, in a letter dated August 7, 2006, plaintiff Doe's former landlord at the time wrote to his tenants as follows:

> On July 27, 2006, the Riverside Township Committee passed

[4]The facts entitling plaintiffs to injunctive relief are essentially undisputed and drawn from the Amended Verified Complaint filed herewith.

> Ordinance 2006-16 which makes it illegal to rent or lease property to an illegal alien. At this time I am requesting that all of my tenants supply me with documentation that you have legal status in this country and you are permitted by law to rent my property. Please supply me with documentation by September 1, 2006.

Plaintiff Doe is concerned that if this Ordinance is enforced, he and his family will be unable to remain in their current residence and find rental property anywhere in Riverside. Plaintiff Doe seeks to prosecute this action under a pseudonym, because he fears retaliation from his landlord, the police, townspeople, and others, particularly in light of the virulent anti-immigration sentiments in the Riverside community which have been engendered by passage of this Ordinance. (See sample of newspaper articles attached as Exhibit "K") (VC ¶4).

The Township is a municipal corporation created under New Jersey law, with its principal place of business located at 1 West Scott Street, in Burlington County, Riverside, New Jersey. It is approximately 1.54 square miles in area, with a population of approximately 8,007 people (VC ¶5).

At all relevant times, Riverside acted through its duly authorized agents, Charles F. Hilton, Sr. Mayor; and Township Council members, James Ott; George Conard; Thomas Coleman; and Marcus Carroll. Currently, Riverside's Mayor is George Conard, and Township Council members are Thomas Coleman; Marcus Carroll; Lorraine Hatcher; and Thomas Polino, who have refused to rescind the Revised Riverside Immigration Ordinance despite its numerous legal infirmities (VC ¶6).

At all times alleged herein, Riverside's officials, employees and agents were acting under color of State law (VC ¶7).

THE REVISED RIVERSIDE IMMIGRATION ORDINANCE

The intent of the Revised Riverside Immigration Ordinance, like its two prior versions, is to regulate immigrants in Riverside despite the absence of state law or constitutional authority permitting such regulation. The current version of the Ordinance suffers from the same constitutional and statutory defects as its predecessors (VC ¶17).

Upon information and belief, prior to adoption of the Revised Riverside Immigration Ordinance, the Township never conducted any written studies of any criminal, land use/zoning, or employment problems confronting the Township to determine if Riverside had any actual problems caused by unlawful immigration or what measures were necessary to rectify those problems. The Township has not conducted any studies since then and has no empirical evidence of the number of "illegal aliens" currently living or residing in Riverside (VC ¶18).

Plaintiffs are unaware of any other municipality in New Jersey which has adopted an ordinance restricting use or rental of property or employment based upon immigration status, or conditioning municipal permits, grants or contracts upon a business' actions concerning immigrants (VC ¶19).

There is no evidence, and the Township has cited none, which indicates that illegal immigration has increased public school overcrowding, or contributed to an increase in the crime rate in Riverside. According to the 2005 Uniform Crime Report issued by the New Jersey State Police, the crime rate in Riverside declined between 2004 and 2005, and fewer violent and non-violent crimes were reported in Riverside in 2005 than reported in 1998 (VC ¶20).

The Township adopted the Revised Riverside Immigration Ordinance to, *inter alia*, prevent the employment of "unlawful workers," as that term is defined in §166-3A(6) from working in the

Township, even on a temporary basis. To effect this goal, the Revised Riverside Immigration Ordinance, under §166-4, renders it unlawful for any "business entity" (as that term is defined in the Ordinance) to recruit, hire for employment, continue to employ, or permit, dispatch or instruct (collectively "hire") any "unlawful workers." Additionally, business entities when applying for or seeking renewal of a business license, or seeking a grant or contract to engage in any type of work in the Township, must sign an affidavit, "affirming that they do not knowingly utilize the services or hire any person who is an unlawful worker," and attest to their compliance with the Revised Riverside Immigration Ordinance when they apply for a business permit to operate in Riverside. This requirement applies regardless of where the individual is employed (VC ¶21).

The Revised Riverside Immigration Ordinance sets forth enforcement mechanisms for the employment sections of the Ordinance. Any Riverside official, business entity or resident may make a complaint to the Riverside Code Enforcement Officer or Township Police (collectively referred to as the "Code Office") (VC ¶22).

To be considered a "valid complaint," it must be submitted in a signed writing, and include an allegation that describes the alleged violator(s), the actions constituting the violation, and the date and location where the actions occurred (VC ¶23).

Upon receipt of a "valid complaint" regarding an alleged "unlawful worker," the Code Office must request, within seven business days, "identity information" from the business entity regarding the worker. The type of "identity information" to be requested or what must be supplied is not defined anywhere in the Revised Riverside Immigration Ordinance (VC ¶24).

Upon receipt of the "identity information," the Code Office is directed to submit the data required by the Federal government to U.S. Immigration Customs Enforcement ("ICE") to verify

the immigration status of the worker. Upon verification of the identity information, the Code Office must provide the business entity with written confirmation of the immigration status (VC ¶25).

If within three business days of receipt of a request from the Code Office the business entity fails to provide the requested identity information, the Code Office is required to immediately suspend the business permit, grant or contract of the business entity. The license, grant or contract is suspended without hearing or notice. Under the terms of the Revised Riverside Immigration Ordinance, the business license, grant or contract must be suspended even if there has been no finding that an "unlawful worker" has been hired (VC ¶26).

If the business entity is notified by the Code Office that a violation of the Revised Riverside Immigration Ordinance has occurred, the entity must "correct" the violation within three business days (VC ¶27).

If the business entity does not correct the violation within three business days, the Code Office is required to suspend the business license of the entity. Once again, this suspension occurs without notice or hearing. The Revised Riverside Immigration Ordinance never defines what a business entity must do to "correct" the violation (VC ¶28).

Absent a business license, those entities subject to the Township's business licensing ordinance cannot operate their business within the Township (VC ¶29).

The Code Office is directed not to suspend the business license of an entity if the business entity previously had used the Basic Pilot Program to verify the worker's status. The Basic Pilot Program is a *voluntary*, experimental program created by Congress to permit employers to electronically verify workers' employment eligibility with the U.S. Dept. of Homeland Security and the Social Security Administration (VC ¶30).

A suspended business license is restored to a business entity within seven business days after a legal representative of the entity submits a sworn affidavit stating that the violation has ended. The affidavit must include a description of the specific action taken by the entity to end the violation and the name, address and other "adequate identifying information" of the unlawful worker (VC ¶31).

If two or more unlawful workers are verified by the Code Office, then - to reinstate its business permit – the business entity must submit, in addition to the sworn affidavit, documentation acceptable to Riverside, confirming that the entity has enrolled and will participate in the Basic Pilot Program for the duration of the validity of the business permit (VC ¶32).

For a second or subsequent violation, the Code Office is required to suspend the entity's business license for thirty (30) days. For a third or subsequent violation, the Code Office shall suspend the business license of a business entity for a period of one (1) year. Once again, these sanctions are issued without notice or hearing (VC ¶33).

The Revised Riverside Immigration Ordinance provides that the discharge by a business entity of any employee who is not an unlawful worker is an "unfair business practice" if, at the time of the discharge, the entity was not participating in the Basic Pilot Program and the entity was employing an unlawful worker. The Revised Riverside Immigration Ordinance fails to describe the nature of this cause of action, where suit may be filed, or the available remedies (VC ¶34).

The Revised Riverside Immigration Ordinance provides no opportunity for a business entity to challenge or toll a suspension mandated under §§166-4B3, 5, or 8 of the Ordinance, nor does it establish a procedure to review the determination of the Code Office prior to or after the suspension of a business license (VC ¶35).

Under §166-4B4, the Township must terminate any grant or contract with a business entity

which is determined to have violated the Ordinance. Nothing in this Ordinance establishes the procedure which the Township must follow prior to imposition of this sanction. Further, the termination of a Township contract because of violation of this Ordinance, in the discretion of the Township, may constitute "prior negative experience" in consideration of the award of future contracts under the Local Public Contracts Law, N.J.S.A. 40A:11-1, *et seq.* (VC ¶36).

As a condition of the award of any Township contract or grant to a business entity where the value of employment, labor, or personal services exceeds the bid threshold established under the Local Public Contracts Law, N.J.S.A. 40A:11-1 *et seq.*, the business entity must enroll in the Basic Pilot Program (VC ¶37).

Pursuant to N.J.S.A. 40:52-1, Riverside has adopted a Business Licensing Ordinance, codified as Chapter 127 of its Municipal Code. Pursuant to this measure, certain designated businesses, upon payment of an initial fee of seventy five ($75) dollars and an annual renewal fee of twenty five ($25) dollars, are entitled to operate a business within the Township (copy of ordinance, as provided by the Township, is attached as Exhibit "I"). To obtain this business license, there is no requirement other than completion of an application and payment of the requisite fee. Under the terms of the Revised Riverside Immigration Ordinance, a business may be denied a license or have its license suspended for up to a year, without any hearing, and thus prevented from operating anywhere in the Township, even though the entity complies with all lawful aspects of the Township's current business licensing ordinance, as established under state law (VC ¶38).

Section 166-5 of the Revised Riverside Immigration Ordinance mandates a scheme similar to the employment provisions for persons and business entities that rent a dwelling unit to anyone in Riverside (hereinafter "Landlord") (VC ¶39).

The Revised Riverside Immigration Ordinance renders it unlawful for any Landlord to "harbor" an "illegal alien." Under §166-5 of the Ordinance, "harboring" is defined as when a Landlord lets, leases, or rents a dwelling unit to an "illegal alien," knowingly or in reckless disregard of the fact that the alien has come to, entered or remains in the United States in violation of law. Harboring also includes permitting the occupancy of a dwelling unit by an illegal alien, either knowingly or in reckless disregard of the fact that the alien has come to, entered or remained in the United States in violation of law (VC ¶40).

Any Riverside official, business entity or resident may make a complaint to the Code Office concerning the harboring provision of the Ordinance. To be considered a "valid complaint," it must be submitted in a signed writing, and include an allegation that describes the alleged violator(s), the actions constituting the violation, and the date and location where the actions occurred (VC ¶41).

The Revised Riverside Immigration Ordinance contains the identical provision defining an invalid complaint for both the employment and harboring sections, stating:

> A complaint which alleges a violation solely or primarily on the basis of national origin, ethnicity, or race shall be deemed invalid and shall not be enforced [§§166-4B2 and 166-5B2].

Under the terms of this Ordinance, a complaint based in part of race, ethnicity, or national origin is valid (VC ¶42).

Upon receipt of a "valid complaint" regarding an alleged "illegal alien," the Code Office is directed to submit the data required by the Federal government to ICE to verify the immigration status of the suspected individual (VC ¶43). However, unlike the employment provisions of the Ordinance, where the Code Office has seven business days to request identity information from the business entity and the entity has three days to supply it, *see* §166-4B3, there is no provision under

§166-5B3 for the Code Office to obtain the identity information from a Landlord, and no provision requiring a Landlord to supply any identity information. Thus, although the Code Office upon receipt of a written complaint is obligated to verify the immigration status of a person seeking to use, occupy, or lease a dwelling, there is no provision describing how the Code Office obtains this information. Even if the Ordinance is construed to permit the Code Office to request such identity information from a Landlord, the type of "identity information" to be requested or which must be supplied by the Landlord is not defined anywhere in the Revised Riverside Immigration Ordinance (VC ¶44).

Section 166-5A3 of the Revised Riverside Immigration Ordinance provides that a Landlord is deemed in violation of the Ordinance for each business day that the Landlord fails to provide such "identity information" about a tenant or occupant, beginning three days after the Landlord receives written notice from the Code Office to provide such identity information (VC ¶45).

Upon verification of the identity information from ICE, the Code Office must provide the Landlord with written confirmation of the suspected "illegal aliens" immigration status (VC ¶46).

After Riverside has verified the immigration status of an "illegal alien," if a Landlord fails to "correct" a violation of the Revised Riverside Immigration Ordinance within seven business days, the Code Office is required to deny or suspend the Landlord's rental license pursuant to §166-5B4 (VC ¶47).

The Revised Riverside Immigration Ordinance never defines what a Landlord must do to "correct" a violation of the Ordinance. However, under the terms of the Ordinance, if occupation of the premises by an identified "illegal alien" constitutes a violation, the only way to end that violation is for the Landlord to immediately evict the tenant (VC ¶48).

Pursuant to N.J.S.A. 46:8-28 *et seq.*, the Township has enacted Ordinance No. 2001-6A and an amendment thereto, which requires the registration and licensing of all rental property within the Township, including providing a comprehensive procedural scheme which must be adhered to prior to the revocation or suspension of a rental license (copy attached as "Exhibit "J"). The Revised Riverside Immigration Ordinance provides for suspension of a rental license in complete derogation of Ordinance No. 2001-6A and without notice or hearing (VC ¶49).

In the absence of a rental license, a Landlord is prohibited from leasing property to a tenant or collecting rent or any compensation from an occupant of the dwelling unit, even from those whose lawful immigration status is undisputed (VC ¶50).

Under the Revised Riverside Immigration Ordinance, a separate violation is deemed committed for each adult "illegal alien" residing in any dwelling unit, beginning one business day after receipt of a notice of violation from the Code Office (VC ¶51).

A suspended rental license may be restored to a Landlord within seven business days after the Landlord submits a sworn affidavit stating that the violation has ended. The affidavit must include a description of the specific action taken by the entity to end the violation and the name, address, and other "adequate identifying information" of the "illegal alien." (VC ¶52).

A Landlord that violates the Revised Immigration Ordinance is subject to the imposition of a fine of between one thousand ($1,000) dollars and two thousand ($2,000) dollars for each adult "illegal alien" harbored in the dwelling unit; a term of imprisonment and/or a period of community service not to exceed 90 days, and suspension of the rental license until the violation is corrected (VC ¶53).

The Revised Riverside Immigration Ordinance provides no prior opportunity or procedure

for a Landlord to challenge or toll the suspension of a rental license provided under §166-5B4 of the Ordinance, nor does it establish a procedure to review the determination of the Code Office prior to or after the suspension of a rental license (VC ¶54).

Neither the Revised Riverside Immigration Ordinance nor any other law defines the term "illegal alien" for purposes of determining whether an individual cannot live and work in the United States nor does the Ordinance specify what documents are necessary to prove or disprove an allegation that a particular individual is an "illegal alien." (VC ¶55).

As a result, plaintiffs Marino and the Coalition and its members cannot take appropriate measures to comply with the Ordinance's prohibition on housing or employing such individuals. Moreover, business owners and landlords, including plaintiffs Marino and the Coalition and its members, may inadvertently consider and classify individuals as illegal, many of whom the federal government might allow to live and work in the United States, including some United States citizens and lawful permanent residents. Similarly, plaintiff Doe and other individual immigrants may be erroneously denied housing and employment because of an erroneous determination under this Ordinance (VC ¶56).

Plaintiffs Marino and the Coalition and its members are harmed by this Ordinance, as they are subjected to the prospect of imprisonment, fines, and a denial or loss of business permits, rental license, Township contracts or grants. Further, plaintiffs Marino and the Coalition and its members are harmed because they are losing revenue and business because of this Ordinance, face the loss or suspension of a business or rental license without notice or established procedure to challenge this sanction, and compliance with this Ordinance may cause them to violate federally-imposed obligations regarding verification of employment, or impair their existing contracts with tenants (VC

¶57).

Plaintiff Doe and other individual immigrants are harmed by this Ordinance because they will be denied the right to live, work, and transact business in Riverside. The effect of this ordinance is to make it virtually impossible for anyone who is considered or perceived to be an "illegal alien" to live or conduct any sort of business in Riverside, even if actually allowed to remain in the United States by the federal government. Plaintiff Doe and others are further harmed because the Ordinance fails to provide a procedure by which they may challenge erroneous determinations and deprivations thereunder. Further, plaintiff Doe and other individual immigrants are subject to unlawful discrimination based upon race, national origin, color, and ancestry, including foreign born appearance and foreign accent, under the Ordinance (VC ¶58).

LEGAL ARGUMENT

I. THE REVISED RIVERSIDE IMMIGRATION ORDINANCE IS *ULTRA VIRES* UNDER STATE LAW, AS THE TOWNSHIP LACKS THE AUTHORITY TO BAN A CLASS OF HOUSING OCCUPANTS BASED UPON IMMIGRANT STATUS, TO DENY A PROPERTY OWNER A SUBSTANTIAL ATTRIBUTE OF OWNERSHIP AND POSSESSION OF REAL ESTATE, TO LIMIT THE HIRING DECISIONS OF BUSINESSES WITHIN THE TOWNSHIP, OR TO REGULATE CONDUCT OF BUSINESSES OUTSIDE OF THE TOWNSHIP.

New Jersey law has long held that a municipality is a creation of the state, possesses only those powers granted to it by the Legislature, and has no inherent authority to enact laws or adopt regulations. *See, e.g., In re Public Service Electric and Gas Co.*, 35 N.J. 358, 370 (1961) ("A municipality being a creation of the state has, of course, only such powers as are delegated to it by the State."); *Auto-Rite Supply Co. v. Woodbridge Twp.,* 25 N.J. 188, 195 (1957) ("A municipal corporation is a government of enumerated powers; it has no inherent jurisdiction to make laws or adopt regulations of government and must stay within its delegated authority.") (and citations

therein); *Wagner v. Newark*, 24 N.J. 467, 474 (1957) (and cases cited therein); *Bucino v. Malone*, 12 N.J. 330, 345 (1953) ("In New Jersey, local government has always been a creation of the Legislature. The people have no inherent right of local self-government beyond the control of the state.") (citation omitted); *Magnolia Development Co. v. Coles*, 10 N.J. 223, 227 (1952); *Edwards v. Mayor and Council of the Borough of Moonachie*, 3 N.J. 17, 22 (1949) ("It is a creature of the Legislature . . . A municipal corporation is a government of enumerated powers, acting by a delegated authority. It has no inherent jurisdiction to make laws or adopt regulations of government.") (citations omitted); *City of Trenton v. State of New Jersey*, 262 U.S. 182, 187 (1923) ("Municipalities have no inherent right of self-government . . . A municipality is merely a department of the State and the State may withhold, grant or withdraw powers and privileges, as it sees fit. However great or small its sphere of action, it remains the creature of the State . . . ") (citations omitted). As Chief Justice Vanderbilt reiterated:

> It is fundamental in our law that there is no inherent right of local self-government beyond the control of the State, and that municipalities are but creations of the State, limited in their powers and capable of exercising only those powers of government granted to them by the Legislature [*Wagner*, 24 N.J. at 474 (citations omitted)].

It is well settled that a locality does not have blanket authority unless it is conferred on it by the state. *See, e.g., Repair Master, Inc. v. Borough of Paulsboro*, 352 N.J. Super. 1, 8 (App. Div. 2002) ("In reviewing any local action, [the Court] start[s] with the basic premise that a municipal corporation may exercise only the power conferred on it by the Legislature."); *West Point Island Civic Association v. Township of Dover*, 54 N.J. 339, 347 (1969) ("[E]very municipal power is the product of a statutory grant."); *Borough of Pitman v. Skokowski*, 93 N.J. Super. 215, 220 (App. Div. 1984) (and cases cited therein) ("As a political subdivision of the State, a municipality owes its very

existence to the State and the extent of its powers and its privileges is entirely subject to the ultimate authority of the legislative process." *Borough of Pitman v. Skokowski,* 193 N.J. Super. 215, 220 (App. Div. 1984) (and cases cited therein).

A. The Township has no authority to regulate in the areas encompassed by the Ordinance.

Although N.J.S.A. 40:48-1 and 40:48-2.12a-r enumerate numerous areas in which express powers are granted to municipalities, none authorize any of the subjects encompassed within the Revised Riverside Immigration Ordinance, either to control immigration, regulate the hiring decisions of private employers, "to ban a class of housing occupants, or deny an owner a substantial attribute of ownership and possession of real estate." *Repair Master*, 352 N.J. Super. at 10.[5] Nor is there any other statutory provision which empowers a municipality to do what Riverside seeks to effectuate in this case, which is in the absence of any state mandated authority, to legislate on matters of its perceived view of the public interest.

Unequivocally lacking express or implied powers to enact the Revised Riverside Immigration Ordinance, the Township may not now justify its actions upon its general police powers under N.J.S.A. 40:48-2[6] to adopt ordinances for the general health, safety, and welfare of the

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[5] N.J.S.A. 40:48-2.12m allows a governing body to adopt ordinances regulating the maintenance and condition of any dwelling unit in any residential rental property "for the purpose of the safety, healthfulness, and upkeep of the structure," and thus permits a municipality "to regulate the physical use of property." N.J.S.A. 40:48-2.12a authorizes a municipality to regulate the use and structure of buildings. Neither allow Riverside to accomplish what it is trying to achieve here, which is "to regulate the attributes of ownership and the nature of the occupancy of the property." *Repair Master,* 352 N.J. Super. at 10 (citation omitted). Similarly, N.J.S.A. 40:48-1 empowers municipalities to hire and establish salaries for municipal employees. Nothing therein or anywhere else authorizes a municipality to regulate the hiring decisions of private employers.

[6] N.J.S.A. 40:48-2 provides in pertinent part:

> Any municipality may make, amend, repeal and enforce such other ordinances, regulations, rules and by-laws not contrary to the laws of this state or of the United States, as it may deem necessary and proper for the good government, order and protection of persons and property, and for the preservation of the

community, or augment its jurisdiction by relying upon the "home rule" provisions of the New Jersey Constitution.[7] "Neither the constitutional nor the statutory provision is a blanket authorization to pursue *the governing body's particularized notion of the* public good or to legislate beyond the bestowed powers, express or implied." *Repair Master*, 352 N.J. Super. at 8 (emphasis added) (citing *Hudson Circle Service Center, Inc. v. Kearney*, 70 N.J. 289, 301).

The grant of power under N.J.S.A. 40:48-2 is limited "to matters of local concern which may be determined to be necessary and proper for the good and welfare of local inhabitants, and not to those matters involving state policy or in the realm of affairs of general public interest and applicability." *Wagner*, 24 N.J. at 478. "[T]here is an implied limitation upon broad grants of power to local municipalities." *Coast Cigarettes Sales v. Long Branch*, 121 N.J. Super. 439, 445 (Law Div. 1972). "Their scope . . . does not extend to subjects inherently in need of uniform treatment or to matters of general public interest and applicability . . ." *Township of Chester v. Panicucci*, 62 N.J. 94, 99 (1973).

Chief Justice Vanderbilt noted in a rather prescient observation:

> *Matters that because of their nature are inherently reserved for the State alone and among which have been the master and servant and landlord and tenant relationships,* matters of descent, the administration of estates, creditors' rights, domestic relations, and

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> public health, safety and welfare of the municipality and its inhabitants, and as may be necessary to carry into effect the powers and duties conferred and imposed by this subtitle, or by any law.

[7]Article IV, §7, paragraph 11 of the State Constitution states in pertinent part:

> The provisions of this Constitution and of any law concerning municipal corporations formed for local government . . . shall be liberally construed in their favor. The powers of . . . such municipal corporations shall include not only those granted in express terms but also those of necessary or fair implication, or incident to the powers expressly conferred, or essential thereto, and not inconsistent with or prohibited by this Constitution or by law.

> many other matters of general and statewide significance, are not proper subjects for local treatment under the authority of the general statutes. [Wagner, 24 N.J. at 478 (emphasis added)].

As the New Jersey Supreme Court made clear in *Wagner* and its progeny, municipalities may not legislate in areas inherently reserved for the State and outside of the municipality's zone of legislative interest.

In this case, Riverside seeks to legislate on questions well beyond matters of local concern. First, immigration is indisputably an issue of national scope and Riverside cannot dispute this fact.[8] The Ordinance itself recognizes this by conceding that "the federal government has passed laws and regulations on [employment and harboring of illegal aliens but] has woefully forsaken the enforcement of same." (Exhibit "A," §166-2D). That Riverside is unhappy with the federal government's response does not convert matters outside of a municipality's zone of legislative interest to those appropriate for local enactments.

Second, even if the Township could somehow justify that it is acting on a matter of local concern, it has no power to interfere with the employment or property decisions of landlords or businesses. The Township has no authority under New Jersey law to regulate the hiring decisions

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[8]As the United States Supreme Court has repeatedly admonished:

> The Constitution grants Congress the power to 'establish an uniform rule of Naturalization.' Art. I, 8, cl. 4. Drawing upon this power, upon its plenary authority with respect to foreign relations and international commerce, and upon the inherent power of a sovereign to close its borders, Congress has developed a complex scheme governing admission to our Nation and status within our borders. . . . The obvious need for delicate policy judgments has counseled the Judicial Branch to avoid intrusion into this field. The States enjoy no power with respect to the classification of aliens . . . This power is 'committed to the political branches of the Federal Government.' . . . Although it is 'a routine and normally legitimate part' of the business of the Federal Government to classify on the basis of alien status, . . . and to 'take into account the character of the relationship between the alien and this country,' . . . only rarely are such matters relevant to legislation by a State. . . . [*Plyler v. Doe,* 457 U.S. 202, 225 (1982) (citations omitted)].

of private employers; to ban a class of housing occupants based upon their immigration status; to deny a property owner a substantial attribute of ownership and possession of real estate; to bar a landlord from leasing property based upon the renter's citizenship or immigration status, or to interfere with the contractual relationships between private parties.[9] The Township has no more authority under state law to restrict employment decisions or real estate rentals based upon an individual's immigration status, than it has to restrict private employment and rentals based upon income, marital status, or biological relationships.[10]

B. The Ordinance creates a likely conflict between the laws of Riverside and those of other municipalities within New Jersey.

Municipalities may not pass legislation that creates an actual or potential conflict with the enactments of other municipalities within New Jersey. "When there is a potential or actual conflict, the definition of the public interest is best left to the State, as the highest level of government." *Repair Master,* 352 N.J. Super. at 8. "Were this not so, then municipalities under these [police power] statutes could legislate on any subject not expressly forbidden to them by law . . . This goes far beyond the purpose of the home rule provisions and the related sections of *Constitution of 1947*." *Wagner,* 24 N.J. at 479.

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[9]Nor does Riverside have the power to enact "just cause" termination provisions for Township employees. Section 166-4E of the Ordinance establishes a private cause of action for any discharged employee "who is not an unlawful worker" and on the date of the discharge, his or her employer was not participating in the Basic Pilot program and was employing someone else who was "an unlawful worker." The common law in New Jersey has recognized that employment is at-will and employees can be discharged with or without cause. *See, e.g., Witkowski v. Thomas J. Lipton, Inc.*, 136 N.J. 385, 297 (1994); *Woolley v. Hoffman-La Roche, Inc.*, 99 N.J. 284, 290 (1985); *English v. College of Medicine and Dentistry of New Jersey*, 73 N.J. 20, 23 (1979). As a result of this Ordinance, business entities operating in New Jersey would be able to terminate employees at-will in any jurisdiction except Riverside, where employees could now have a private cause of action for *any* discharge.

[10]In *United Property Owners v. Belmar*, 343 N.J. Super. 1, 51-54 (App. Div.), *certif. denied*, 170 N.J. 390 (2001), the Appellate Division recently invalidated a municipal ordinance which required a landlord to disclose the identity of tenants in connection with summer rentals. Here, the Township is not seeking the identity of tenants but the wholesale exclusion of an entire class of tenants.

The Riverside Ordinance creates the realistic risk of substantial conflict between municipalities in New Jersey. Employment and housing issues, by their nature, or the specific definition of an "illegal alien" or "unlawful worker" are indisputably subjects requiring uniform treatment, not only to ensure a consistent approach, but to prevent one municipality from solving its perceived economic and social ills at the expense of surrounding towns. To permit Riverside to legislate in this area is to encourage the very types of retaliatory and divisive municipal enactments which the courts in New Jersey have long sought to avoid by clearly curtailing these types of local initiatives.[11]

C. The Ordinance impermissibly regulates immigration beyond the borders of Riverside.

Finally, as a local municipality, Riverside cannot regulate conduct beyond its borders and certainly cannot punish Township businesses for immigration decisions made outside of Riverside or in any of the 49 other states outside of New Jersey. As drafted, §166-4 of the Ordinance requires a business entity, in order to apply for or to renew a business license, or apply for a Township grant or contract, to sign an affidavit that it does not utilize the services or hire any person who is an "unlawful worker." This applies regardless of the location of the employment, even though Riverside has no authority to regulate conduct beyond the Township's borders.

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[11]The same concerns for uniformity and to avoid conflict has resulted in the United States Supreme Court repeatedly invalidating state statutes relating to non-citizens. *See, e.g., Toll v. Moreno*, 458 U.S. 1, 10 (1982) (invalidating state denial of student financial aid to certain visa holders); *Graham v. Richardson*, 403 U.S. 365, 377-80 (1971) (invalidating state welfare restriction on benefits to resident aliens); *Takahashi v. Fish & Game Commission*, 334 U.S. 410, 418-20 (1948) (invalidating state denial of commercial fishing licenses to aliens); *Hines v. Davidowitz*, 312 U.S. 52, 62-68 (1941) (invalidating state alien registration scheme); *Traux v. Raich*, 239 U.S. 33, 42 (1915) (invalidating state employer sanctions scheme under Fourteenth Amendment restricting employment to citizens and suggesting Supremacy Clause violation); *Chy Lung v. Freeman*, 92 U.S. 275 (1876) (invalidating state statute that authorized state official to classify certain arriving immigrants as undesirable and indirectly bar their entry); *Henderson v. Mayor of New York*, 92 U.S. 259 (1876) (invalidating state bond requirement for arriving immigrants); *cf., Plyler v. Doe*, 457 U.S. 202 (1982) (invalidating state statute which withheld from local school districts state funds for education of children not "legally admitted" into the United States, and authorized local school districts to deny enrollment to such children).

D. Riverside cannot assert general police powers to regulate perceived socio-economic problems.

Riverside may not somehow justify its enactment based upon its conclusory findings in its ordinance, asserted without evidence, that illegal immigrants have somehow contributed to a negative impact on Riverside's streets and housing, neighborhoods, schools, crime rate, and allegedly diminished the overall quality of life in the Township.[12] Over the past three decades,

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[12]The Township admittedly adopted the ordinance without a scintilla of evidence supporting its alleged "findings" and the data that has been publicly reported belies the ordinance's findings. Thus, a newspaper article written shortly after the ordinance's enactment, reported as follows:

> In its ordinance specifying fines and/or jail time for those who hire or rent to illegal immigrants, the committee declared that, among other ills, illegal immigration 'leads to higher crime rates' and 'contributes to overcrowded classrooms and failing schools.'
>
> Neither the chief of police nor the superintendent of schools will say that's true of Riverside, however, and both the crime statistics and the school enrollment data are inconclusive.
>
> 'The schools are not overcrowded at this point,' Superintendent of Schools Robert Goldschmidt said this week in the wake of the township committee's passage of its Illegal Immigration Relief Act ordinance. 'But we are getting close at some levels. Enrollment has been up the last year or two.'
>
> Enrollment has grown from 1,380 students in the 2002-2003 school year to 1,444 students in 2005-2006, during which time the number of Hispanic students increased from 78 to 201.
>
> But there is no way to determine how many, if any, of the new Hispanic students are illegal immigrants.
>
> 'We require documentation that a child lives in Riverside,' Goldschmidt said, the same as any other district in New Jersey, but not based on citizenship or immigration status, inquiries it is prohibited by law from making.
>
> A number of factors may be contributing to the recent uptick in enrollment, Goldschmidt said, including the closure of two Catholic schools in the township in the past two years.
>
> 'School funding is a bigger issue for us than immigration,' Goldschmidt said, referring to the state's failure to adequately fund its schools.
>
> Statistics compiled by the state police show a crime index that varies from year to year, but was lower in 2004, the last year for which they were available, than it was in 1997. [Richard Pearsall, "Riverside law not based on statistics,"

courts in New Jersey have repeatedly rejected efforts by local municipalities similar to Riverside's attempt in this case, to solve perceived socio-economic problems by regulating the identity of housing occupants or the attributes of ownership of property. Although municipalities are empowered to regulate the physical use of property, they have absolutely no right or authority to regulate the identity of tenants or to preclude an owner from a substantial attribute of ownership.

In *Kirsch Holding Co. v. Borough of Manasquan*, 59 N.J. 241 (1971), the New Jersey Supreme Court considered the validity of zoning ordinance provisions prohibiting "group rentals" or seasonal shore rentals.

> It is elementary that substantive due process demands that zoning regulations, like all police power legislation, must be reasonably exercised – the regulation must not be unreasonable, arbitrary or capricious, the means selected must have a real and substantial relation to the object sought to be obtained, and the regulation or proscription must be reasonably calculated to meet the evil and not exceed the public need or substantially affect uses which do not partake of the offensive character of those which cause the problem sought to be ameliorated. [*Kirsch*, 59 N.J. at 251].

The New Jersey Supreme Court articulated the pitfalls of attempting to cure social problems through land use regulations: "[t]he practical difficulty of applying land use regulation to prevent the evil is found in the seeming inability to define the offending groups precisely enough so as not to include innocuous groups with the prohibition." *Id.* at 253. As the New Jersey Supreme Court admonished, perceived problems with criminal or antisocial behavior are to be dealt with directly by enforcement of existing criminal ordinances, not by use of ordinances to exclude a class of tenants.

> Ordinarily obnoxious personal behavior can best be dealt with

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Courier Post, July 29, 2006].

> officially by vigorous and persistent enforcement of general police power ordinances and criminal statutes.
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> * * *
>
> Zoning ordinances are not intended and cannot be expected to cure or prevent most antisocial conduct in dwelling situations. [*Kirsch*, 59 N.J. at 253-54].

See also, Borough of Glassboro v. Vallorosi, 117 N.J. 421, 433 (1990). The Court held that the zoning ordinance provisions were "so sweepingly excessive, and therefore legally unreasonable, that they must fall in their entirety." *Id.* at 252. In this case, Riverside has attempted to use its general police powers to "cure its perceived socio-economic problems, an impermissible arrogation of governmental power." *Repair Masters*, 352 N.J. Super. at 11.

Similarly, in *State v. Baker*, 81 N.J. 99 (1979), the New Jersey Supreme Court struck down a municipality's attempt to preserve the family character of its neighborhoods by prohibiting more than four unrelated persons from sharing a single family unit. The Supreme Court recognized that although a municipality has a legitimate interest in maintaining the residential quality of its neighborhoods, it cannot achieve that goal by regulating the internal composition of residential units.

> A municipality may not, for example, zone so as to exclude from its borders the poor or other unwanted minorities . . . Nor may zoning be used as a tool to regulate the internal composition of housekeeping units . . . A municipality must draw a careful balance between preserving family life and prohibiting social diversity. [*Baker*, 81 N.J. at 106].

The Supreme Court stressed that municipal concerns should be addressed through enforcement of existing ordinances which must bear a much closer relationship to the actual problem, not through efforts to use municipal police power, as has Riverside, to regulate internal living relationships.

> Area or facility related ordinances not only bear a much greater relation to the problem of overcrowding than do legal or biologically based classifications, they also do not impact upon the composition

> of the household . . . Other legitimate municipal concerns can be dealt with similarly. Traffic congestion can appropriately be remedied by reasonable evenhanded limitations upon the number of cars which may be maintained at a given residence.
>
> Moreover, area-related occupancy restrictions will, by decreasing density, tend by themselves to reduce traffic problems. Disruptive behavior – which, of course, is not limited to unrelated households – may properly be controlled through the use of the general police power . . . Restriction based upon legal or biological relationships such as Plainfield's, impact only remotely upon such problems and hence cannot withstand judicial scrutiny. [*Baker*, 81 N.J. at 110-111].

In concluding that limitations on the number of unrelated persons cannot pass constitutional muster under Article I, paragraph 1 of the New Jersey Constitution, the *Baker* Court stressed that the method adopted was insufficiently related to the perceived ills sought to be rectified:

> Today we hold that municipalities may not condition residence upon the number of unrelated persons present within the household. Given the availability of less restrictive alternatives, such regulations are insufficiently related to the perceived social ills which they were intended to ameliorate. [*Baker*, 81 N.J. at 115].

In *Urban v. Planning Board*, 124 N.J. 651, 662 (1991), the New Jersey Supreme Court criticized the Planning Board's denial of subdivision applications because of the potential for absentee ownership of the lots. The Court pointedly stated:

> In this case we believe that the Planning Board was moved in part by inappropriate factors, such as the possibility that subdivided lots would be held by absentee owners, thus exacerbating a problem of municipal regulation of summer rentals. We have repeatedly emphasized that the answer to such problems lies not in the zoning power but in the police power to insist on strict compliance with all other regulations. *See State v. Baker*, 81 N.J. 99 (1979) (socially disruptive behavior best regulated through use of general police power); *Kirsch Holding Co .v. Borough of Manasquan*, *supra*, 59 N.J. at 253-54 (same). The minutes of the Planning Board meeting showed clearly that it was motivated, at least in part, by the nature of the proposed ownership, with one Board member saying, 'one of the problems we have with absentee landlords is the fact that when we

> try to take some sort of action against the owner of the property, a couple [of problems] come up.' That is clearly an inappropriate factor that undercuts the presumptive correctness of the Planning Board's decision. [*Urban*, 124 N.J. at 662-63].

See also, Borough of Glassboro v. Vallorosi, 117 N.J. 421 (municipality may not adopt zoning regulations that unreasonably distinguish between unrelated and related persons in residential occupancy) (cited by *Urban*, 124 N.J. at 662); *Cherry Hill Township v. Oxford House*, 263 N.J. Super. 25 (App. Div. 1993) (residence for recovering alcohol and drug dependent persons not a zoning violation simply because occupants unrelated); *Larson v. Mayor and Council of Borough of Spring Lake*, 99 N.J. Super. 365, 374-377 (Law Div. 1968) (ordinances prohibiting unrelated persons from living together, enacted under municipality's general police power to proscribe excessive noise, intoxication, rowdyism, and breach of public peace and order, were unreasonable and unnecessarily prohibited otherwise lawful conduct, particularly in the absence of showing any attempt by the municipality to enforce regulations reasonably designed to respond to its enumerated problems).

The Revised Riverside Immigration Ordinance suffers from the same fatal flaws. If the Township is concerned about crime, housing density, traffic congestion, or school overcrowding, the solution is to enforce its existing criminal laws, housing codes, area-related occupancy provisions, even-handed parking restrictions, and existing school residency requirements. Although it may be politically convenient to scapegoat illegal immigrants, none of Riverside's alleged problems are unique to illegal immigrants, or even demonstrated to be related to them in Riverside's case. Riverside may not attempt to solve its perceived social difficulties by the wholesale exclusion of a class of persons, many of whom have nothing to do with the problems which Riverside seeks to ameliorate. Given the availability of less restrictive alternatives, Riverside may not adopt a

blunderbuss ordinance insufficiently related to the alleged ills it seeks to cure.

If there is any doubt as to the limits of Riverside's authority in this area and the invalidity of its immigration enactment, it is unequivocally resolved by the Appellant Division in its recent decision in *Repair Master*. Therein, the issue was Paulsboro's authority to place a moratorium on the issuance of licenses for residential rental properties. According to Judge King, this moratorium "was prompted by the perception that the increased number of rental units had a negative effect upon the real estate market, drove up municipal operating costs, negatively impacted tax rates, and placed additional strain upon the school system." *Repair Master,* 352 N.J. Super. at 4. Paulsboro commissioned a study "to analyze the socio-economic impacts, fiscal impacts, real estate market effects, and tax base implications of the conversion of single family owner-occupied dwellings to renter-occupied units throughout the community." *Id.* Based upon the findings of the study that the proportion of renter to owner-occupied tenants in Paulsboro's housing market is beyond the threshold for balanced, healthy neighborhoods, and that the presence of rental units has an adverse socio-economic effect on the neighborhood, Paulsboro adopted an ordinance which placed a moratorium on the issuance of new licenses. *Repair Master*, 352 N.J. Super. at 4-8.

In an extremely strongly worded opinion, the Appellate Division struck down Paulsboro's moratorium on rental units, concluding that the municipality lacks the authority "to ban a class of housing occupants or deny an owner a substantial attribute of ownership and possession of real estate." *Repair Master*, 352 N.J. Super. at 10. Judge King stressed "that a municipal corporation may exercise only the power conferred on it by the Legislature" [and] N.J.S.A. 40:48-2 should be understood as the legislative implementation of this authority. *Id.* At 8. He continued that municipalities do not possess "a blanket authorization to pursue the governing body's particularized

notion of the public good." *Repair Master,* 352 N.J. Super. at 8. He emphasized that Paulsboro is not attempting "to regulate the physical use of property but . . . the attributes of ownership and the nature of the occupancy of property," which as he explained, "have not fared well in our courts, presumably because of a lack of authorization by statute." *Repair Master,* 352 N.J. Super. at 10.

After canvassing New Jersey court decisions which have repeatedly invalidated attempts to regulate attributes of ownership and/or to ban a class of housing occupants, *id.* at 11-13, Judge King admonished that "[r]estrictions on types of occupancy may also create equal protection issues, which in the past, 'have been raised most notably by municipal efforts to exclude low and moderate income people from communities . . .'" *Repair Master,* 352 N.J. Super. at 13 (and citations therein). In words which we could not improve upon, Judge King opined:

> We conclude that the Legislature did not imply the power to municipalities to deny or regulate a property owner's right to rent non-owner occupied residential housing in an effort to alter the community's dynamics and demographics, and control the ratio of owners and tenants. This is a power we simply will not infer in light of the evidence and the history of our land use and occupancy jurisprudence. If this power is conferred on municipalities, we think it should be the result of legislative deliberation and evaluation of all the complex considerations, not from a judicially-created attempt to accommodate a single, though doubtlessly sincere, municipal effort. The problem could be compounded if other municipalities were to take this route and seek an arguably more desirable occupancy mix. Specific legislative approval should be a precondition to the exercise of a power we consider a radical regulatory development. [*Repair Master,* 352 N.J. Super. at 14].

The identical sentiments compel invalidating the Revised Riverside Immigration Ordinance. Regardless of the Township's intent, the Ordinance legislates on a subject which is inappropriate for municipal enactment. Riverside lacks any legal authority to regulate the hiring decisions of private businesses within the Township, to ban a class of housing occupants, control a landlord's

rental rights, or to deny a property owner a substantial attribute of ownership. These powers have never been ceded by the Legislature to New Jersey municipalities and cannot be inferred from the State's land use, occupancy and employment jurisprudence. Riverside may not solve its perceived social ills by excluding an entire class of persons it conveniently deems undesirable.

Although it may be good politics for the Township Mayor and Council, to "fan the flames" of anti-immigrant sentiment by enacting the Revised Riverside Immigration Ordinance, it is bad policy and even worse law. The Township's enactment, which has caused turmoil, dissension and disruption throughout Riverside, is mischievous and intolerable. Immigration is a complex issue and requires a carefully balanced, well-thought-out and uniform approach. New Jersey can ill afford multiple rogue municipalities like Riverside, to enact their own strains of "immigration reform" to serve myopic and misguided political interests. Equally important, New Jersey law unequivocally does not tolerate such misadventures.

Whether characterized as an attempt to control the hiring or rental decisions of local employers and landlords, or as an effort to regulate "illegal immigrants," the Revised Riverside Immigration Ordinance encompasses a subject matter upon which New Jersey municipalities lack the power to legislate. Where a municipality acts utterly beyond its authority, as the Township has done here, its actions are *ultra vires* and the Ordinance must be enjoined in its entirety. *Property Owners and Managers Association v. Town Council of Parsippany - Troy Hills*, 264 N.J. Super. 523, 537 (App. Div. 1993) (and citations therein).

II. THE REVISED RIVERSIDE IMMIGRATION ORDINANCE IS INVALID AS IT IS PREEMPTED BY STATE LAW.

Even if this Court concludes that the Revised Riverside Immigration Ordinance is within the police power of the municipality to enact, which it is not, it is nonetheless invalid because it is

preempted by state law in a variety of ways. "[A]n ordinance properly enacted and within the police power of the municipality will be invalid if it intrudes upon a field preempted by the Legislature." *Plaza Joint Venture v. Atlantic City*, 174 N.J. Super. 231, 238 (App. Div. 1980). Preemption is "a judicially created principle based on the proposition that a municipality, which is an agent of the State, cannot act contrary to the State." *Overlook Terrace Mgmt. Corp. v. Rent Control Board of West New York*, 71 N.J. 451, 461 (1976); *Summer v. Teaneck*, 53 N.J. 548, 554 (1969). "When the Legislature has preempted a field by comprehensive regulation, a municipal ordinance attempting to regulate the same field is void if the municipal ordinance adversely affects the legislative scheme." *Plaza Joint Venture*, 174 N.J. Super. at 238 (citing *Fair Lawn Educ. Ass'n. v. Fair Lawn Bd. of Educ.*, 79 N.J. 574, 586 (1979)); *State v. Crawley*, 90 N.J. 241, 250 (1982) ("when the Legislative intends a statute to be the sole regulator of an area, local legislation in that area is precluded"). As the New Jersey Supreme Court has explained:

> a legislative intent to preempt a field will be found either where the state scheme is so pervasive or comprehensive that it effectively precludes the coexistence of municipal regulation or where the local regulation conflicts with the state statutes or stands as an obstacle to a state policy expressed in enactments of the Legislature [*Garden State Farms, Inc. v. Bay*, 77 N.J. 439, 450 (1978)].

It is axiomatic that "a municipality may not deal with the subject if the Legislature intends its own action, whether it exhausts the field or touches only part of it, to be exclusive and therefore to bar municipal legislation." *State v. Ulesky*, 54 N.J. 26, 29 (1969). "A subject in need of statewide uniformity is one in which the 'needs with respect to those matters do not vary locally in their nature or intensity. Municipal action would not be useful, and indeed diverse local decisions could be mischievous and even intolerable.'" *Mack Paramus Co. v. Mayor and Council of the Borough of Paramus*, 103 N.J. 564, 577 (1986) (citations omitted).

New Jersey courts have long held that "when a state statute has preempted a field by supplying a complete system of law on a subject, an ordinance dealing with the same subject is void." *See e.g., Brunetti v. Borough of New Milford*, 68 N.J. 576, 601 (1975) (municipal ordinance which limits the grounds for eviction preempted by state law); *Ringlieb v. Parsippany-Tory Hills Tp.*, 59 N.J. 348 (1971) (state regulation of solid waste disposal); *Summer*, 53 N.J. 548 (ordinance designed to prevent block busting); *Mogolefsky v. Schoem*, 50 N.J. 588 (1967) (licensing of real estate brokers); *Township of Franklin v. Hollander*, 172 N.J. 147 (2002) (Right to Farm Act preempts municipality exercising its powers under the Municipal Land Use Law, N.J.S.A. 40:55D-1 to 112). That an ordinance does not conflict with a state statute is irrelevant, as "courts may still find that there has been preemption by the state even where there is no apparent conflict between the state and local enactments." *Brunetti*, 68 N.J. at 602 (and cases cited therein). *See e.g., Ulesky*, 54 N.J. 26 (municipal registration of criminals); *Chester Tp. v. Panicucci*, 116 N.J. Super. 229, 234-35 (App. Div. 1971), *aff'd.* 62 N.J. 94 (1973) (municipal regulation of firearms); *Coast Cigarette Sales*, 121 N.J. Super. at 446 (licensing of cigarette vending machines); *Dimor, Inc. v. Passaic,* 122 N.J. Super. 296 (Law Div. 1973) (state obscenity laws). "If upon an examination of the totality of the subject matter, it is concluded that the Legislature intended to solely occupy the field, it would then have preempted the same and the ordinance of necessity would be *ultra vires*, and invalid." *Dimor*, 122 N.J. Super. at 302.

Justice Schreiber, in *Overlook Terrace Management Corp.*, enumerated the pertinent questions for consideration in determining the applicability of preemption as follows:

> 1. Does the ordinance conflict with state law, either because of conflicting policies or operational effect (that is, does the ordinance forbid what the Legislature has permitted or does the ordinance permit what the Legislature has forbidden)?

> 2. Was the state law intended, expressly or impliedly to be exclusive in the field?
>
> 3. Does the subject matter reflect a need for uniformity?
>
> 4. Is the state scheme so pervasive or comprehensive that it precludes coexistence of municipal regulation? . . .
>
> 5. Does the ordinance stand 'as an obstacle to the accomplishment and execution of the full purposes and objectives' of the Legislature? [*Id.*, 71 N.J. at 461-462 (citation omitted)].

In this case, the Riverside ordinance is preempted because it directly interferes with the New Jersey Anti-Eviction Act, N.J.S.A. 2A:18-61.1, which is the state statute enacted to exclusively govern eviction of tenants; the Local Public Contracts Law, N.J.S.A. 40A:11-1 to 56 (hereinafter referred to as "LCPL"), the state law which establishes a comprehensive procedure for the award of certain local public contracts; the New Jersey Licensing statutes, N.J.S.A. 40:52-1 *et seq.*, which authorizes municipalities to license businesses and establishes the circumstances and procedure for suspension of such licenses; and New Jersey's Child Labor Laws, N.J.S.A. 34:2-21.1 *et seq.*

As previously indicated, §166-5 of the Revised Riverside Immigration Ordinance precludes property owners from renting or leasing property to an illegal alien, and once a landlord has been notified of the presence of an alleged illegal alien, the landlord has seven days to remove the tenant, or face immediate suspension of rental license, loss of rental income, fines and incarceration. Essentially, the Ordinance requires immediate eviction of tenants to avoid its draconian sanctions. In addition, although the Anti-Eviction Act prescribes the explicit procedure and time requirements which a landlord must follow prior to removal of a tenant, N.J.S.A. 2A:18-61.2, under the Revised Riverside Immigration Ordinance, a landlord is subject to loss of rental license and rental income, fines and imprisonment as long as continuing to lease to an alleged "illegal alien," even if this delay

occurs while the landlord is complying with the stringent requirements of the Anti-Eviction Act.

The Anti-Eviction Act "was enacted to protect residential tenants from the effects of what has become a critical housing shortage." *Montgomery v. Gateway v. Herrera*, 261 N.J. Super. 235, 241 (App. Div. 1992). The purpose of the Act, set forth in the statement appended to *Assembly Bill* 1586, enacted as L. 1974 c. 49, and codified as N.J.S.A. 2A:18-61.1, reads as follows:

> At present, there are no limitations imposed by statute upon the reasons a landlord may utilize to evict a tenant. As a result, residential tenants frequently have been unfairly and arbitrarily ousted from housing quarters in which they have been comfortable and where they have not caused any problems. This is a serious matter, particularly now that there is a critical shortage of rental housing space in New Jersey. *This act shall limit the eviction of tenants by landlords to reasonable grounds and provide that suitable notice shall be given to tenants when an action for eviction is instituted by the landlord.* [*See Morristown Memorial Hospital v. Wokem Mortgage and Realty Co.*, 192 N.J. Super. 182, 186 (App. Div. 1983) (emphasis added)].

The Act "provides substantial protections to a residential tenant." *Starns v. American Baptist Estates of Red Bank*, 352 N.J. Super. 327, 331 (App. Div. 2002). "Indeed, the effect of the Act 'is to create a perpetual tenancy, virtually a life interest, in favor of a tenant of residential premises covered by the Act as to whom there is no statutory cause for eviction under N.J.S.A. 2A:18-61.1.'" *J.M.J. Properties v. Khuzzam*, 365 N.J. Super. 325, 332 (App. Div. 2004) (citations omitted and citations therein). Courts in New Jersey have repeatedly recognized that the Anti-Eviction Act "is remedial legislation expressing a strong public policy which should be construed liberally to advance its beneficial ends." *Montgomery Gateway*, 261 N.J. Super. at 241; *Housing Authority v. Williams*, 263 N.J. Super. 561, 564 (Law Div. 1993).

The Anti-Eviction Act, N.J.S.A. 2A:18-61.1 sets forth in great detail the specific grounds under which a tenant may be removed. The Act never indicates that a tenant may be removed

because of citizenship or immigration status. Essentially, Riverside is imposing grounds for eviction which are not enumerated in the comprehensive state statute the Legislature adopted to govern removal of tenants. Moreover, N.J.S.A. 2A:18-61.2 specifies the precise procedure and notice provisions which a landlord must follow prior to eviction of a tenant. It was enacted to avoid the very type of "self-help" remedy which the Revised Riverside Immigration Ordinance mandates: the immediate removal of any person identified by the Township as an "illegal alien." Riverside's Ordinance imposes requirements upon landlords to evict tenants based upon grounds and a procedure which is inconsistent with the Anti-Eviction Act, which was undisputedly adopted by the New Jersey Legislature to establish a uniform statewide procedure to govern the critical relationship between landlords and tenants.

New Jersey courts have long recognized that as remedial legislation, the Anti-Eviction Act should be strictly construed, and have rejected attempts by landlords to remove tenants for reasons not set forth in the Act.[13] Analysis by Judge Winkelstein's in *Williams* is particularly instructive, in holding that conviction for conspiracy to distribute drugs rather than a substantive offense under N.J.S.A. 2A:18-61.1(n) was not grounds to evict a tenant under the Act.

> The Act must be read in a manner which will give effect to the legislative purpose behind it, which is to protect residential tenancies . . . Had the Legislature intended to include conspiracy to commit a drug offense as a basis for eviction under subsection (n) of the Act, it clearly could have so stated . . . By implication it is therefore concluded that the Legislature did not intend to include conspiracy to

[13] *See e.g., Ivy Hill Park Section III v. Smirnova*, 362 N.J. Super. 421, 427-428 (Law Div. 2003) (noxious odor emanating from apartment after tenant fell asleep did not constitute grounds for eviction under the statute); *Williams*, 263 N.J. Super. at 565-566 (conviction for conspiracy to distribute drugs rather than underlying substantive drug offense covered by the Anti-Eviction Act was not a basis for removal); *Chapman Mobile Homes v. Huston*, 226 N.J. Super. 405 (Law Div. 1988) (landlord cannot evict based upon tenant's failure to adhere to notice to terminate tenancy, as that was not one of the designated statutory grounds for removal under the Anti-Eviction Act).

> distribute a controlled dangerous substance as an offense which would require a tenant's removal under the Act. [*Williams*, 263 N.J. Super. at 565-566].

Had the New Jersey Legislature intended to include alienage or citizenship status as a statutory basis for tenant eviction, it could have easily done so. However, it is not for Riverside to substitute its judgment for the Legislature as to the grounds warranting removal of tenants.

The New Jersey Supreme Court in *Brunetti,* explicitly held that with the passage of the Anti-Eviction Act, the Legislature evidenced its intent to preempt this area of the law, and any municipal ordinance which sets forth any other reason for eviction, even in the absence of any conflict with state law is invalid. In *Brunetti,* the Supreme Court concluded that because the Anti-Eviction Act provided "a complete system of law," it inferred a legislative intent to exclude parallel enactments.

> With the enactment of N.J.S.A. 2A:18-61.1 in 1974, which sets forth specific enumerated grounds of eviction, there can be no longer any doubt that the Legislature intended to preempt this area of the law. Consequently, we hold that provisions in municipal ordinances which set forth grounds for eviction or dispossession are invalid has having been preempted by state enactments. [*Id.*, 68 N.J. at 603].

See e.g., Crawley, 90 N.J. at 250 (Code of Criminal Justice preempted local loitering ordinance, as Code manifested "clear design for uniform statewide treatment" and "complete systems of law"); *Wein v. Town of Irvington*, 126 N.J. Super 410, 414 (App. Div.), *certif. denied*, 65 N.J. 287 (1974) (municipal pornography ordinance voided on preemption grounds because corresponding state statute manifested "a clear design for uniform state treatment").

The Revised Riverside Immigration Ordinance which requires property owners to immediately remove tenants based upon their citizenship or immigration status or suffer continued sanctions, including loss of rental license and income, fines, and incarceration is clearly preempted by the Anti-Eviction Act. The only way to avoid or toll these rather onerous sanctions is by

immediate removal of the offending tenant regardless of the landlord's leasehold obligations. That the Township seeks to accomplish this objective indirectly by requiring landlords to remove tenants rather than Township officials effectuating the eviction is of no moment. Since lawfully, a tenant in New Jersey may be removed only through procedure and reasons established under the Anti-Eviction Act, the Revised Riverside Immigration Ordinance is nothing but a device to require evictions by landlords upon grounds and through a procedure contrary to that set forth in the Anti-Eviction Act. Moreover, the Ordinance punishes a landlord even if a tenant remains while the landlord is complying with the mandatory requirements of the Anti-Eviction Act. Clearly, §166-5 of the Ordinance is undisputedly preempted, as the Anti-Eviction Act is meant to exclude any local enactments or ordinances concerning the subject.

For similar reasons, by requiring each business entity who seeks a public contract to sign an affidavit in advance that they do not knowingly utilize the services or hire any person who is an unlawful worker; requiring all prospective contractors under the LPCL to enroll in the Basic Pilot Program; and to terminate a contract of the lowest responsible bidder without notice or hearing because a business entity violates any portion of the Revised Riverside Immigration Ordinance, the Ordinance imposes requirements which are inconsistent with and is preempted by the Local Public Contracts Law, N.J.S.A. 40A:11-1 to 56.

"New Jersey has a long tradition of requiring open and free competitive bidding for public contracts." *Borough of Princeton v. Mercer County*, 333 N.J. Super. 310, 328 (App. Div. 2000) (citing *Terminal Construction Cor. v. Atlantic County Sewerage Authority*, 67 N.J. 403 (1975); *Twp. of Hillside v. Sternin*, 25 N.J. 317 (1957)). According to the New Jersey Supreme Court the "practice of public bidding is universally recognized and deeply embedded in the public policy of

this State." *N.E.R.I. Corp. v. New Jersey Highway Authority*, 147 N.J. 223, 236 (1996).

To that end, the Legislature has enacted the LPCL, which is a "comprehensive statutory framework governing public contracts," *Clean Earth v. Hudson County*, 379 N.J. Super. 261, 267 (App. Div. 2005), under which N.J.S.A. 40A:11-6.1 requires contracts to be awarded to the "lowest responsible bidder." To ensure that bidding is fair and free from fraud, New Jersey courts have curtailed "the discretion of local authorities by demanding strict compliance with public bidding guidelines." *L. Pucillo & Sons, Inc. v. Mayor & Council of the Borough of New Milford*, 73 N.J. 346, 356 (1977) (citations omitted). *See also, Autotote, Ltd. v. New Jersey Sports & Exposition Authority*, 85 N.J. 363, 370 (1981) (noting that courts have construed LPCL strictly, "so as not to dilute [public policy] or permit a public body to avoid pertinent legislative enactments."); *Kurman v. City of Newark*, 124 N.J. Super. 89, 94 (App. Div.) ("Statutes calling for public bidding . . . should be construed with sole reference to the public good and rigidly adhered to by the court."), *certif. denied*, 63 N.J. 563 (1973). "Public bidding statutes exist for the primary benefit of the taxpayer and not the bidder . . . and must be construed with 'sole reference' to the public good and rigidly adhered to by courts . . ." *N.E.R.I. Corp.*, 147 N.J. at 236 (and cases cited therein); *Borough of Princeton*, 333 N.J. Super at 328 (and cases cited therein).

In this case, LCPL sets forth a comprehensive procedure for the award of public contracts. With an obvious overriding need for uniformity, the LCPL was designed to be comprehensive and to prevent local governmental units from substituting their own peculiarities or requirement not recognized by the Legislature.

The LCPL does not authorize local municipalities to deny a contract to the lowest bidder simply because the contracting party does not wish to sign an affidavit regarding his hiring practices

or has allegedly violated a municipal-imposed immigration status and notification requirement. Nor should a local contracting entity be penalized because it refused to enroll in the Basic Pilot Program, which was intended by Congress as a voluntary experimental program. *See* Illegal Immigrant Reform and Immigrant Responsibility Act ("IIRIRA"), §§401, 402(a), Pub. L. No. 104-28, Div. C (Sept. 20, 1996), *codified as amended,* at 8 U.S.C. §1324a notes:[14] Nor does a municipality have any authority to terminate a publicly awarded contract absent a hearing, particularly when the entity is performing pursuant to its executed agreement with the Township.

The Local Public Contracts Law would become a nullity if each municipality in New Jersey is able to impose its own peculiar requirements not set forth anywhere in the statute which are completely unrelated to the Legislature's underlying objectives. By establishing uniform standards, the LPCL sought to prevent each municipality in New Jersey from using the award of public contracts to further its own parochial political agenda. Those aspects of the Riverside ordinance which seek to rescind any existing public contracts for violators of the Revised Riverside Immigration Ordinance, or which impose additional requirements upon prospective bidders, are unequivocally preempted by the Local Public Contracts Law. N.J.S.A. 40A:11-1 *et seq.*

The Revised Riverside Immigration Ordinance is preempted in two other significant ways. N.J.S.A. 40:52-1 establishes the right of municipalities to enact and enforce ordinances to license certain businesses. N.J.S.A. 40:52-2 authorizes a governing body to fix fees for such licenses, to

[14]Congress explicitly limited those employers required to participate in the Basic Program or a related program, IIRIRA, §402(e), which does not include either entities seeking a public contract or violators of the Revised Riverside Immigration Ordinance. Congress also explicitly provided that the government "*may not require* any person or other entity to participate in a pilot program." IIRIRA §401(a) (emphasis added). Finally, Congress specifically omitted a provision which would have given state and local governments access to the Basic Pilot Program. *See* 149 Cong. Rec. H 11582-01 (2003) (statement of Rep. Jackson-Lee) ("I am pleased to note that the Senate removed a provision that would give State and local governments access to the information collected with this program . . .").

impose penalties for violation of ordinances providing for licenses, and to revoke any licenses "for sufficient cause after notice and hearing." Pursuant to those provisions, Riverside has adopted a Business Licensing Ordinance, which permits those businesses subject to its provisions, upon payment of certain designated fees, to obtain a license to operate a business within the Township.

By permitting a business license to be suspended and/or revoked without notice and hearing, and to authorize such a suspension even though the business entity has paid all of its fees and complied with the Township's current Business Licensing Ordinance, the Revised Riverside Immigration Ordinance is contrary to and preempted by the New Jersey Licensing statute, which explicitly specifies that a business license may be removed only after notice and hearing. N.J.S.A. 40:52-2.[15]

The provisions of the Revised Riverside Immigration Ordinance are also preempted by N.J.S.A. 34:2-21.1 *et. seq.*, which is a comprehensive state statute governing the employment of child labor. N.J.S.A. 34:2-21.18 delegates to the New Jersey Department of Labor and Industries and its inspectors and agents, acting under the Commissioner of Labor, the exclusive responsibility to enforce the provisions of New Jersey's child labor laws, to issue complaints to entities violating its provisions, and to prosecute violators. Further, N.J.S.A. 34:2-21.19 establishes the penalties for

[15]For similar reasons, Riverside's efforts to suspend the rental license of a landlord for violation of the Revised Riverside Immigration Ordinance is likely preempted by N.J.S.A. 46:8-28 *et seq.*, which mandates the registration of rental units either with the State of New Jersey or within the municipality where the property is located, and permits localities to adopt local registration ordinances, which Riverside has done, including a comprehensive procedural scheme to which the Township must adhere prior to the revocation or suspension of a rental license (See Township Ordinance 2001-6A, at p. 9-11, Exhibit "J"). The Revised Riverside Immigration Ordinance which provides for suspension of a rental license without any hearing and for reasons not specified in the State's registration statute or the Township's rental registration and licensing ordinance, is equally preempted by those enactments. Further, although N.J.S.A. 40:52-1.2 allows a municipality, as a condition for issuance or removal of any license or permit, to require payment of delinquent property taxes, nothing in that statute or any other state law authorizes the denial of a license or permit because of a renter's or an employee's immigration status. *Cf., Ocean County Board of Realtors,* 248 N.J. Super. 241 (municipal ordinance which conditioned certificate of occupancy for residential resales upon payment of municipal real estate taxes and water and sewer charges which are due or delinquent at the time of the application for the certificate is preempted by state tax code).

anyone who employs a minor in violation of the Act.

Under §166-3A6 of the Revised Riverside Immigration Ordinance, an "unlawful worker" includes a person "who does not have the legal right or authorization to work . . . including but not limited to a minor disqualified by nonage . . ." The Ordinance provides that any person may file a complaint, the Code Office is empowered to enforce provisions pertaining to the employment of a minor disqualified by nonage, and the only penalty for such a violation is the suspension of a business license, grant or contract.

The provisions of the Revised Riverside Immigration Ordinance which define an "unlawful worker" as "including but not limited to a minor disqualified by nonage" are undisputedly preempted by New Jersey's Child Labor Laws, which establish a uniform system and designated agency to regulate underage employment in New Jersey.

The Revised Riverside Immigration Ordinance interferes directly with and is preempted by the New Jersey Anti-Eviction Act, N.J.S.A. 2A:18-61.1 and 61.2; the LPCL; N.J.S.A. 40A:11-1 to 56; the New Jersey Business Licensing statutes, N.J.S.A. 40:52-1 and 2; and New Jersey's Child Labor Laws, N.J.S.A. 34:2-21.1 *et. seq*., areas where the New Jersey Legislative unequivocally intended that uniform state enactments would solely occupy the field. For this reason alone, the Revised Riverside Immigration Ordinance is *ultra vires,* as it is preempted by state law.[16]

III. THE REVISED RIVERSIDE IMMIGRATION ORDINANCE VIOLATES THE DUE PROCESS PROVISIONS OF ARTICLE I, PARAGRAPH I OF THE NEW JERSEY CONSTITUTION, AS IT IS IMPERMISSIBLY VAGUE.

[16]As indicated, the Revised Riverside Immigration Ordinance was not crafted locally, but was modeled after an ordinance developed by an organization in Washington, D.C. and enacted in Hazleton, Pennsylvania. Although the internet is a powerful tool, it does not replace the need to carefully draft local ordinances which comport with New Jersey law.

Even if this Court concludes that the Riverside ordinance is not *ultra vires* or preempted by state law, plaintiffs are still entitled to declaratory and injunctive relief because the Ordinance as drafted is impermissibly vague, in violation of Article I, paragraph 1 of the New Jersey Constitution.[17]

The New Jersey Supreme Court has long recognized that vague laws are unenforceable under the New Jersey Constitution. *See, e.g., State v. Cameron*, 100 N.J. 586, 591 (1985); *Pazden v. New Jersey State Parole Board*, 374 N.J. Super. 356, 368 (App. Div. 2005). "Vagueness 'is essentially a procedural due process concept grounded in notions of fair play.'" *State v. Lee*, 96 N.J. 156, 165 (1984) (citing *State v. Lashinsky*, 81 N.J. 1, 17 (1979)). "A statute that is vague creates a denial of due process because of a failure to provide notice and warning to an individual that his or her conduct could subject that individual to criminal or quasi-criminal prosecution." *State v. Hoffman*, 149 N.J. 564, 581 (1997) (and citations there). "[T]he constitutional ban on vague laws is intended to invalidate regulatory enactments that fail to provide adequate notice of their scope and sufficient guidance for their application." *Cameron*, 100 N.J. at 591. As the New Jersey Supreme Court explained:

> [c]lear and comprehensible legislation is a fundamental prerequisite of due process of law, especially where criminal responsibility is involved. Vague laws are unconstitutional even if they fail to touch constitutionally protected conduct, because unclear or incomprehensible legislation places both citizens and law enforcement officials in an untenable position. Vague laws deprive citizens of adequate notice of proscribed conduct, and fail to provide officials with guidelines sufficient to prevent arbitrary and erratic enforcement. [*State v. Afanador*, 134 N.J. 162, 170 (1993) (quoting

[17] Article I, paragraph 1 of the New Jersey Constitution provides that "all persons are by nature free and independent and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness."

Town Tobacconist v. Kimmelman, 94 N.J. 85, 118 (1983))].[18]

Moreover, because municipal court proceedings to prosecute violations of ordinances similar to the Riverside ordinance are essentially criminal in nature, such penal ordinances must be strictly construed. *Township of Pennsauken v. Schad*, 160 N.J. 156, 171 (1999); *State v. Golin*, 363 N.J. Super. 474, 482 (App. Div. 2003); *Maplewood v. Tannenhaus*, 64 N.J. Super. 80, 89 (App. Div. 1960), *certif. denied*, 34 N.J. 325 (1961). "A penal ordinance offends due process if it does not provide legally fixed standards and adequate guidelines for police and others who enforce the laws." *Golin*, 363 N.J. Super. at 482; *Betancourt v. Town of West New York*, 338 N.J. Super 415, 422 (App. Div. 2001) (*citing Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972)); *Town Tobacconist*, 94 N.J. at 118. "Vague language and inadequate standards permit the subjective and therefore impermissible enforcement of penal ordinances by the police." *Betancourt*, 338 N.J. Super. at 422 (*citing Grayned*, 408 U.S. at 108-109 (1972)). "'A violation of an ordinance should not depend upon which enforcement officer, or for the matter which judge,' happens to be considering the actor's conduct." *Guidi v. City of Atlantic City*, 286 N.J. Super. 243, 245-246 (App. Div. 1996) (citation omitted).

To withstand a void for vagueness challenge, the municipal ordinance must be written in

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[18] The United States Supreme Court expounded upon the evils of vague laws as follows:

> "Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." [*Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972) (footnotes omitted)].

terms sufficiently clear and precise to "enable a person of 'common intelligence in light of ordinary experience' to understand whether contemplated conduct is lawful." *Cameron*, 100 N.J. at 591 (citation omitted); *Lashinsky*, 81 N.J. at 18. The ordinance must define the offense "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). A law is void if it is so vague that persons "must necessarily guess at its meaning and differ as to its applications." *Town Tobacconist*, 94 N.J. at 118. "A[n] ordinance must meet the test of certainty and definiteness . . . If the ordinance fails this test, it must be 'invalidated as impermissibly vague and indefinite.'" *Damurjian v. Board of Adjustment*, 299 N.J. Super 84, 95 (App. Div. 1997) (and citations omitted). As the New Jersey Supreme Court admonished:

> [A] legislative act, whether a statute or ordinance, must not be so vague that a person of ordinary intelligence is unable to discern what it requires, prohibits, or punishes . . . No one should be criminally responsible for conduct that could not reasonably be understood to be proscribed [*Brown v. City of Newark*, 113 N.J. 565, 572-573 (1989) (and citations therein)].

That an offender has received specific notice of a violation prior to enforcement is irrelevant. "Although knowledge that the municipality considers certain behavior to be a nuisance allows ordinary people to understand that their conduct is prohibited by the ordinance, it does not prevent arbitrary or discriminatory enforcement of the ordinance in the first place . . ." *Golin*, 363 N.J. Super at 484-485; *Betancourt*, 338 N.J. Super at 423. As the United States Supreme Court admonished many years ago in *Lanzetta v. N.J.*, 306 U.S. 451, 453 (1939):

> If on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it. It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression.

It is not for this Court or defendant's counsel to rewrite such vague provisions.

> * * * the legislative power must be exercised by the municipality itself; it may not ask the court to write a better or a different ordinance. And it should speak clearly * * * especially in view of the predicament of the citizen who seeks in good faith to utilize his property [*Jantausch v. Borough of Verona*, 41 N.J. Super. 89, 104 (Law Div. 1956); *aff'd.*, 24 N.J. 326 (1957)].

See also, Schack v. Trimble, 48 N.J. Super. 45, 53 (App. Div. 1957), *aff'd.*, 28 N.J. 40, 54 (1958).

The fact that Riverside might assure the public that its enactments will be implemented in a reasonable manner is of no moment. "This presumes that [the government] will act in good faith and adhere to standards absent from the statute's face. But this is the very presumption that the doctrine forbidding unbridled discretion disallows." *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 770 (1988). "[T]he ordinance so commanding must be in clear terms, either by precise definition or common understanding . . . The municipality cannot simply leave the entire process in the hands of its agents, no matter how well intentioned." *Damurjian*, 299 N.J. Super at 97. Any criteria which the Township contends are implicit in its ordinances should be explicit by textual incorporation, binding judicial or administrative precedent, or well established practice. *Poulos v. New Hampshire*, 345 U.S. 385 (1953). "A defendant should not be obligated to guess whether his conduct is criminal. Nor should the statute provide so little guidance . . . that law enforcement is so uncertain as to become arbitrary." *Lee*, 96 N.J. at 166. "This Court [should] not write nonbinding limits into a silent [municipal enactment]." *City of Lakewood*, 486 U.S. at 700. An ordinance may be challenged as being either facially vague or vague 'as applied.' *State v. Maldonado*, 137 N.J. 536, 563 (1994); *Cameron*, 100 N.J. at 593. "[A] law that is challenged for facial vagueness is one that is assertedly impermissibly vague in all its applications." *Cameron*, 100 N.J. at 594.

The Revised Riverside Immigration Ordinance is unequivocally facially vague, as it utterly lacks a modicum of definiteness. The Ordinance's purported definition of the term "illegal alien" is completely inadequate in light of the exceedingly complex nature of immigration law.

The Ordinance provides that an "illegal alien" is an "alien who is not lawfully present in the United States, according to the terms of the United States Code, Title 8, Section 1101, *et seq.*" §166-3A4. Yet the statute to which the Ordinance refers – the Immigration and Nationality Act (the "INA"), 8 U.S.C. §1101 *et seq.*, runs more than 500 printed pages. The accompanying regulations, issued by various federal agencies, total more than 1,000 additional pages. The INA represents a comprehensive system of laws, regulations, procedures, and created administrative agencies that determine, subject to judicial review, whether and under what conditions an individual may enter, remain, and work in the United States. *See Baltazar-Alcazar v. INS*, 386 F.3d 940, 948 (9th Cir. 2004) ("[w]ith only a small degree of hyperbole, the immigration laws have been termed second only to the Internal Revenue Code in complexity.") (citation omitted). The plaintiffs' lack any training, experience, or expertise in applying immigration law, making immigration status decisions, or determining the authenticity of immigration-related documents, all of which are necessitated by the Revised Riverside Immigration Ordinance.

Despite the exceeding complexity of immigration law, the Revised Riverside Immigration Ordinance does not set forth any procedure for landlords to definitively determine whether an individual is an "illegal alien."[19]

[19]Upon information and belief, Riverside has not entered into any agreement with any federal agency establishing the procedure to be utilized by the Township, nor has it otherwise been granted the authority to use or access any federal government immigration verification system for purposes of verifying the immigration status of employees and renters pursuant to §§166-4B3 and 166-5B3 of the Revised Riverside Immigration Ordinance, assuming that such a system even exists.

Landlords will be completely unable to determine which individuals fall within the Ordinance's inadequate definition of "illegal alien." Indeed, the federal government allows numerous individuals to reside or work in the United States even though they may lack a current legal status. The Ordinance's language produces virtually no notice of which of these individuals are covered by its terms, and which are not.

Under Federal law, various categories of persons can receive Federal permission to work, and implicitly to stay and reside in the United States, even though they may be violating immigration laws. *See, e.g.,* 8 C.F.R §274a.12(a)(11-13)(c)(8-11, 14, 18-20, 22, 24) (listing some categories of persons who can receive federal permission to work, and implicitly to stay, in the United States even though they may be violating the immigration laws). For example, such persons may have pending applications to adjust to a lawful status pursuant to the Violence Against Women Act, 8 U.S.C. §1255(m), or under 8 U.S.C. §1255(i). Further, even persons placed in deportation proceedings may obtain temporary or permanent permission to remain in the United States during the course of the proceeding.[20] In addition, certain persons released from detention based on mandates and restrictions imposed by the Supreme Court, though subject to an order of removal, are permitted to stay and work in the U.S. Moreover, persons who are applying for or have been granted "temporary protected status" are permitted to stay and work in the United States if they meet certain requirements, notwithstanding the fact that they are otherwise removable. Federal officials may also exercise discretion not to deport persons who are otherwise removable. *See* 8 C.F.R §212.5(f).

[20]*See, e.g.,* 8 U.S.C. §1154 (procedure for granting immigrant status to certain relatives of U.S. citizens and lawful permanent residents); 8 U.S.C. §1229(b) (cancellation of removal for certain relatives of U.S. citizens and lawful permanent residents); 8 U.S.C. §1229(b)(2) (cancellation for certain battered spouses and children); 8 U.S.C. §123(b)(3) (restricting removal of individuals subject to persecution); 8 U.S.C. §§208.16-18 (deferral of removal under Convention Against Torture).

To further complicate matters, the U.S. Department of Housing and Urban Development, the federal agency in charge of housing, expressly permits persons lacking eligible immigration status to live with persons who are recipients of federal housing subsidies. *See* 24 C.F.R §5.508(e) (providing that "[i]f one or more members of a family elect not to contend that they have eligible immigration status, and other members of the family establish their citizenship or eligible immigration status, the family may be eligible for assistance . . . despite the fact that no declaration or documentation of eligible status is submitted for one or more members of the family"); *see also* 24 C.F.R §5.520 (providing for prorated subsidies based on the number of persons in the household eligible for benefits). Thus, persons who may not be lawfully present are explicitly permitted to reside in housing partially subsidized by the federal government.

In light of the labyrinthine character of the federal immigration laws, the Ordinance's failure to provide adequate notice or guidelines to landlords with respect to persons falling within the term "illegal alien" renders it impermissibly vague.

Further, the Revised Riverside Immigration Ordinance lacks any standards for implementation. The Ordinance does not define what type of "identity information" is to be requested by the Code Office from a business entity or a Landlord, or what must be supplied in response to a complaint. The Ordinance never even defines what must be done to correct a violation. Neither the plaintiffs nor a person of reasonable intelligence can determine from its provisions, what conduct is encompassed within it, and/or what conduct is permitted or proscribed by it.

Moreover, portions of the Revised Riverside Immigration Ordinance are virtually incomprehensible as drafted. For example, although §166-5B3 of the Ordinance requires the

Township enforcement officials, upon receipt of a written complaint, to "verify with the federal government the lawful immigration status of a person seeking to use, occupy, lease, or rent a dwelling unit in the Township," unlike the employment provisions in §166-4B3, there is absolutely no provision authorizing enforcement officials to obtain "identity information" regarding a tenant from a property owner, nor is there any provision establishing the type of "identity information" which a property owner must supply. This is particularly problematic, since under the Riverside Ordinance, violation of the rental provisions may result in immediate loss of a rental license without any hearing either before or after its suspension, a fine, and incarceration up to 90 days.

Section 166-4D of the Revised Riverside Immigration Ordinance establishes a private cause of action for any employee who is not an unlawful worker who is discharged for any reason, if on the date of the discharge, the business entity was not participating in the Basic Pilot program and the business entity was employing someone else who is an unlawful worker. Notwithstanding this provision, the Ordinance is completely silent as to the nature of this cause of action, the remedies available, or even the appropriate forum to initiate suit.[21] As drafted, this section appears to preclude the termination of an employee for any reason, including theft, fraud, or destruction of property as long as the remaining conditions are met, leaving Riverside employers virtually defenseless, even if they had justifiable grounds to discharge the employee.

Nor does the Ordinance offer any guidance as to its scope. Although §166-5B3 of the Revised Riverside Immigration Ordinance authorizes enforcement officials to verify the immigration status of person seeking "to use, occupy, lease, or rent a dwelling unit in the Township." What constitutes use? Does it apply to activities such as hosting guests and relatives on temporary visits,

[21]The Ordinance claims that such a discharge "is an unfair business practice," which is a term which has no meaning in an employment context under New Jersey law.

attending a birthday celebration, sharing a meal, or joining a card game? It is absolutely impossible to determine its scope from the Ordinance's provisions.

Neither the plaintiffs nor those charged with enforcing the Revised Riverside Immigration Ordinance will be able to comply with its terms, determine what conduct is permitted or proscribed, or enforce it in a consistent manner. *See, e.g., Lionshead Woods v. Kaplan Bros.,* 250 N.J. Super. 545, 548-549 (Law Div. 1991) ("[T]he ordinance is impermissibly vague because it lacks clear standards to guide either an applicant for development or the local officials who must administer it."). On pain of immediate loss of business or rental license without a hearing before or after the deprivation, and the simultaneous loss of the ability to operate a business or rental property within the Township, as well as fines and imprisonment, plaintiffs should not be required to guess as to what conduct is covered by the Revised Riverside Immigration Ordinance.

In circumstances similar to these, where either an ordinance lacks sufficient definiteness of critical terms, or the standards that are offered are so vague and ambiguous that the ordinance cannot be adequately enforced, New Jersey courts have consistently invalidated such ordinances on vagueness grounds. *See, e.g., Weiner v. Borough of Stratford*, 15 N.J. 295, 299 (1954) (ordinance requiring all businesses to obtain license invalid, "unless the provisions of a licensing and regulatory ordinance . . . provide adequate standards to govern the deliberations of officials . . . the provisions must be struck down as utterly void."); *New Jersey Builders Association v. Mayor and Township Council of East Brunswick*, 60 N.J. 222, 233 (1972) ("These matters, as well as other instances of obscurity and lack of clarity in the ordinance . . . should not be left in doubt or for judicial interpretation; the lawgivers' meaning should be made clear and exact . . . We do not think it fair to builders that they be required to submit to regulations so vague and imprecise."); *Cameron,* 100

N.J. 586 (finding that a municipal zoning ordinance that excludes "churches and similar places of worship" from a residential use district cannot be applied to prohibit a minister from temporarily using his home to hold a one hour religious service each week for his congregation, as the ordinance is unconstitutionally vague); *Golin*, 363 N.J. Super at 485 (a municipality's ordinance prohibiting the maintenance of a public nuisance is unconstitutionally vague); *Guidi*, 286 N.J. Super. at 244 (same).

The Revised Riverside Immigration Ordinance is indefinite and fails to provide adequate notice of its scope or sufficient guidance for compliance. On its face, it violates plaintiffs' fundamental due process rights under Article I, paragraph 1 of the New Jersey Constitution. On that ground alone, it should be invalidated and plaintiffs granted injunctive relief.

IV. THE REVISED RIVERSIDE IMMIGRATION ORDINANCE VIOLATES THE DUE PROCESS PROVISIONS OF ARTICLE I, PARAGRAPH I OF THE NEW JERSEY CONSTITUTION, BECAUSE IT DEPRIVES PERSONS OF PROTECTED PROPERTY AND LIBERTY INTERESTS WITHOUT AFFORDING MEANINGFUL NOTICE, AND ANY OPPORTUNITY TO CHALLENGE AN ADVERSE DETERMINATION.

A. An overview of the requirements of due process.

Article I, paragraph 1 of the New Jersey State Constitution mandates that no person be deprived of life, liberty or property without due process of law. *See e.g.*, *Rivera v. Board of Review*, 127 N.J. 578, 583 (1992) ("The Constitution demands that a person may not be deprived of property or liberty absent due process of law.").[22] "In procedural due process claims, the deprivation by state

[22]In addition, New Jersey has long recognized that its doctrine of fundamental fairness may be applicable even in the absence of due process protection. "New Jersey's doctrine of fundamental fairness 'serves to protect against unjust and arbitrary government action and specifically against government procedures that tend to operate arbitrarily.'" *Doe v. Poritz*, 142 N.J. 1, 108 (1995) (citation omitted). Although applied in a variety of contexts, the New Jersey Supreme Court has stressed that there is one common denominator in all of these cases: "a determination that someone was being subjected to potentially unfair treatment and there was no explicit statutory or constitutional

action of a constitutionally protected interest in 'life, liberty, or property' is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law*." *Zinermon v. Burch*, 494 U.S. 113, 125 (1990) (emphasis in original) (citations omitted). "Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property." *Carey v. Piphus*, 435 U.S. 247, 259 (1978).

In analyzing procedural due process, New Jersey courts have predicated their approach upon decisions from the United States Supreme Court. *See e.g., New Jersey Parole Bd. v. Byrne*, 93 N.J. 192, 209 (1983) ("Our State view of what process is due is similar [to the federal court's view under the Fourteenth Amendment]."); *Klebanow v. Glaser*, 80 N.J. 367, 377 (1979) (after conducting federal due process analysis, holding: "We see no reason to reach a different conclusion in interpreting the comparable provision of the New Jersey Constitution (1947), Art. I, par. 1.").

New Jersey courts have adopted a more expansive view of due process requirements than their federal counterparts.

> Our analysis [of procedural due process under the New Jersey Constitution] differs from that under the Federal Constitution only to the extent that we find a protectable interest in reputation without requiring any other tangible loss. In interpreting the State Constitution, we 'look to both the federal courts and other state courts for assistance . . . [but] [t]he ultimate responsibility for interpreting the New Jersey Constitution . . . is ours.' [*Doe v. Poritz*, 142 N.J. at 104].

See also, Byrne, 93 N.J. at 208 ("We observe that we have generally been more willing to find state-created interests that invoke the protection of procedural due process than have our federal

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protection to be invoked." *Doe*, 142 N.J. at 109.

counterparts."); *Callen*, 92 N.J. 114 (statute pertaining to distraint violation of due process, as it lacked procedures for taking property and deprived persons of goods without notice and hearing); *In re B.L.*, 346 N.J. Super. 285 (App. Div. 2002) (establishing additional due process procedural requirements when patient conditionally released from a psychiatric hospital is recommitted); *In re M.G.*, 331 N.J. Super. 365 (App. Div. 2000) (requiring notice and procedures for certain sexual offenders prior to temporary commitment to the Sexually Violent Predator facility).

The New Jersey Supreme Court has stressed that due process is a "dynamic concept," *Callen v. Sherman's Inc.*, 92 N.J. 114, 136 (1983) and its "sense of fairness cannot be imprisoned in a crystal." *Id.* at 134. As New Jersey courts have reiterated: "[d]ue process is a flexible concept." *In re M.G.*, 331 N.J. Super. at 375; *In re B.L.*, 346 N.J. Super. at 302. "Both [the New Jersey Supreme] Court and the Supreme Court of the United States have recognized that due process is a flexible concept." *Callen*, 92 N.J. at 127 (and cases cited therein).

"Determining what is required to satisfy due process under a 'given set of circumstances must begin with a determination of the precise nature of the government function involved as well as the private interest that has been affected by the governmental action.'" *In re M.G.*, 331 N.J. Super. at 375 (citation omitted). Courts apply a two step test for examining claims alleging such unlawful deprivations.

> [T]he first asks whether there exists a liberty or property interest which has been interfered with by the State; the second examines whether the procedures attendant upon the deprivation were constitutionally sufficient *[Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 460 (1989) (citations omitted)].

Accord, Alvin v. Suzuki, 227 F.3d 107, 116 (3d Cir. 2000).

The Revised Riverside Immigration Ordinance deprives plaintiffs of both "property" and

'liberty" interests. Property interests are "created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Cleveland Board of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985) (citations omitted). "Liberty interests that trigger procedural due process may be created by state law or by the federal constitution itself." *E.B. v. Verniero*, 119 F.3d 1077, 1105 (3d Cir. 1997), *cert. denied*, 522 U.S. 1109 (1998).[23] New Jersey has recognized that mere damage to reputation, which may impair an ability to seek employment is sufficient to establish a protectable liberty interest. *See, e.g., Doe*, 142 N.J. at 104-105; *In Re the Matter of Allegations of Sexual Abuse at East Park High*, 314 N.J. Super. 149, 163 (App. Div. 1998) ("the defamation of Mrs. Spencer's good name and the statutory impediment to hiring her . . . [creates] a protectable liberty interest (the right to work) subject to due process under both the federal and state constitutions.") (citations omitted) (parenthetical in original).

"In determining the procedures required to address and protect those . . . interests, [the New Jersey courts] apply the analysis set forth by the United States Supreme Court in *Matthews v. Eldridge*, 424 U.S. 319 (1970)." *J.E. on Behalf of G.E. v. State*, 131 N.J. 552, 566 (1993) (and cases cited therein); *East Park High School*, 314 N.J. Super. at 160. Under the *Matthews* test, this Court must balance three factors: (1) "the private interest that will be affected by the official action;" (2) "the risk of erroneous deprivation of such interest through the procedures used, and the probable

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[23]Protectable liberty interests extend beyond,

> merely freedom from bodily restraint but also [to] the *right of the individual to contract, to engage in any of the common occupations of life,* to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men. In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed. [*Board of Regents v. Roth*, 408 U.S. 564, 572 (1972) (emphasis added)].

value, if any, of additional or substitute procedural safeguards;" and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* at 334-35; *accord E.B.*, 119 F.3d at 1106-07. Applying this standard, the Revised Riverside Immigration Ordinance violates the due process provisions of the New Jersey Constitution by depriving business entities, landlords, employees, and tenants of protected property and liberty interests without adequate notice or any procedure to challenge any adverse determinations.[24]

B. Section 166-4 of the Revised Riverside Immigration Ordinance interferes with liberty and property interests of both employer and employees.

Both employers and employees have protected interests in continued employment. From an employer's perspective, there are fundamental interests in maintaining the business and contracting with employees. *See, e.g., College Savings Bank v. Florida Prepaid Postsecondary Educ. Exp. Bd.*, 131 F.3d 353, 361 (3d Cir. 1997) ("Clearly, a business is an established property right entitled to protection"), *aff'd.*, 527 U.S. 666, 675 (1999) ("The assets of a business (including its good will) unquestionably are property, and any state taking of those assets is unquestionably a 'deprivation' under the Fourteenth Amendment") (parenthetical in original); *Roth*, 408 U.S. at 572; *Small v.*

[24]New Jersey courts have repeatedly held that due process requires meaningful notice of any adverse determination. *See e.g., Donaldson v. Board of Education*, 65 N.J. 236, 245-246 (1974) (holding nontenured teachers entitled to statement from local board of education as to reasons for nonretention); *J.A. v. Board of Education for the District of South Orange and Maplewood*, 318 N.J. Super. 512, 523-525 (App. Div. 1999) (local board of education excluding a student must disclose reason for the exclusion from school); *State v. Cengiz*, 241 N.J. Super. 482, 496-97 (App. Div. 1992) ("defendant here is entitled to statement of reasons for the prosecutor's decision not to join his application for probationary drug rehabilitative treatment and judicial review of prosecutor's adverse decision."); *R.R. v. Board of Educ.*, 109 N.J. 337, 349 (Ch. Div. 1970) (requiring that students facing expulsion from a state college or university be afforded due process protection, including a statement of charges and grounds that would justify expulsion if proven). Under Riverside's Ordinance, an individual immigrant receives absolutely no notice regarding the basis of any adverse determination and no procedure to challenge such a determination.

United States, 333 F.2d 702, 704 (3d Cir. 1964). New Jersey courts have long recognized that both an occupational license and business operational license are in the nature of a property right and any deprivation is subject to the requirements of due process. *See e.g., In Re Polk License Revocation,* 90 N.J. 550, 562 (1982); *Graham v. N.J. Real Estate Comm'n.*, 217 N.J. Super. 130, 135 (App. Div. 1987); *New Jersey Department of Environment Protection v. Atlantic States Caste Iron Pipe Company*, 241 N.J. Super. 591, 601 (App. Div. 1990). Further, the New Jersey Business Licensing statute, which is the statutory predicate for Riverside to issue the very business licenses which the Township seeks to suspend without a hearing in connection with a violation of the Revised Riverside Immigration Ordinance, only permits revocation of a license "after notice and hearing." N.J.S.A. 40:52-2.

From the employee's perspective, the ability to earn a living is vital: "[T]he significance of the private interest in retaining employment cannot be gainsaid. We have frequently recognized the severity of depriving a person of the mans of livelihood." *Loudermill,* 470 U.S. at 543. As a result, for nearly a century, courts have recognized that "the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." *Truax v. Raich*, 239 U.S. 33, 41 (1915); *see also Abrahams v. Civil Service Commission,* 65 N.J. 61, 84 (1974). "The right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within both the 'liberty' and 'property' concepts of the Fifth and Fourteenth Amendments." *Greene v. McElroy,* 360 U.S. 474, 492 (1959); *see also, Bowman v. Township of Pennsauken*, 709 F.Supp. 1329, 1345 (D.N.J., 1989); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) ("Without doubt, ['liberty'] denotes not merely freedom from bodily restraint but also the right of

the individual to contact, to engage in any of the common occupations of life . . ."). New Jersey courts have long held that decisions which may stigmatize an employee and imperil future job opportunities create a protected "liberty" interest warranting protection under the New Jersey Constitution. *See, e.g., Melani v. County of Passaic,* 345 N.J. Super. 579, 587-590 (App. Div. 2001); *East Park High School,* 314 N.J. Super. at 163; *Dolan v. City of East Orange,* 287 N.J. Super. 136, 143-144 (App. Div. 1996) (and cases cited therein).

Section 166-4 of the Revised Riverside Immigration Ordinance effects deprivation of constitutionally protected liberty and property interests by giving Riverside the power to immediately suspend business permits and public contracts of any entity that has been accused of employing an "unlawful worker." Further, by branding an employee as an "illegal alien" and/or an "unlawful worker," Riverside has seriously stigmatized that individual and imperiled current and future job prospects. Although federal immigration law prohibits certain non-citizens from working, it cannot be presumed that Riverside's determinations about who is an "unlawful worker" or an "illegal alien" are correct; it is precisely that determination which must be subjected to due process before we can know whether it is correct and before sanctions can be imposed.

C. Section 166-5 of the Revised Riverside Immigration Ordinance implicates landlords' and tenants' property rights.

Both landlords and tenants have a "property" interest in their homes and apartments because real property, a lease, and a rental license are all recognized as protectable interests. Courts have long recognized that the "right to maintain control over [one's] home, and to be free from governmental interference, is a private interest of historic and continuing importance." *United*

States v. James Daniel Good Real Property, 510 U.S. 43, 53-54 (1993).[25] This right is afforded to owners and tenants alike. *See Greene v. Lindsey*, 456 U.S. 444, 450-451 (1982) (recognizing that tenants enjoy a constitutionally protected property interest in their continued residency. *See also, Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel*, 67 N.J. 151, 178-179 (1975) ("There cannot be the slightest doubt that shelter, along with food, are the most basic human needs . . . It is plain beyond dispute that proper provision for adequate housing of all categories of people is certainly an absolute essential in promotion of the general welfare . . .") (citations omitted). Riverside recognizes the protected nature of a rental license, as Ordinance No. 2001-6A, which requires the registration of all rental property, prescribes a lengthy and specific procedure, including notice and hearing, to be followed prior to revocation or suspension of a rental license (Exhibit "J" at 9-11). The deprivation of real property need not be total or permanent to trigger procedural protections. "[E]ven . . . temporary or partial impairments to property rights . . . 'are subject to the strictures of due process.'" *Connecticut v. Doehr*, 501 U.S. 1, 12 (1991) (citations omitted).

Both landlords and tenants have protected interests in a government's decision to terminate a tenancy or suspend a rental license. Procedural due process must attend governmental deprivations of a landlord's rental income and rental license, *James Daniel Good Real Property*, 510 U.S. at 54, and a tenant's continued residence in any rental property. *Greene*, 456 U.S. at 450-451. Section 166-5 of the Revised Riverside Immigration Ordinance effects the deprivation of both landlords' and tenants' protected property rights.

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[25] *See also*, Erwin Chemerinsky, *Constitutional Law: Principles and Policies*, 536 (2002) ("There never has been doubt that the government must provide due process before it deprives a person of real or personal property"); *Dennison v. Pennsylvania Dept. Of Corrections*, 28 F.Supp. 2d 387, 400 (M.D. Pa. 2003) ("Real property ownership has been historically protected by the Constitution and is considered fundamental to American society"), *quoting Regents of Univ. Of Michigan v. Ewing*, 474 U.S. 214, 229-230 (1985) (Powell, J., concurring).

D. The Revised Riverside Immigration Ordinance deprives persons of protected interests without providing prior notice or meaningful opportunity to challenge an adverse determination in violation of due process.

It has long been recognized that at a minimum, procedures depriving a person of protected interests must provide "the opportunity to be heard 'at a meaningful time.'" *Matthews*, 424 U.S. at 333 (citation omitted). "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co..*, 339 U.S. 306, 313 (1950). *See also, Matthews,* 424 U.S. at 333 (The "right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society."). Except in "extraordinary situations," due process must *precede* the deprivation. *James Daniel Good Real Property,* 510 U.S. at 53 (citations omitted). New Jersey courts have been extremely vigilant to ensure that adequate notice and procedures are provided to prevent erroneous determinations. *See, e.g.*, *Rivera*, 127 N.J. 578 (notice procedures and practices applied by New Jersey Department of Labor to migrant farm workers inadequate to protect due process rights; procedure must ensure that recipient of unemployment benefits knows that an initial determination of ineligibility has been made and has sufficient time to appeal before that determination becomes final); *Callen,* 92 N.J. at 138 ("By depriving the tenant of its goods without notice and hearing, the landlord violated the tenant's right to due process.). Indeed, the deprivations effectuated upon tenants under the Ordinance is functionally equivalent to the New Jersey Supreme Court's conclusion in *Callen* that landlords violated a tenant's rights by depriving the tenant of his or her goods without notice and hearing. *Id.*

The procedural due process afforded under the Revised Riverside Immigration Ordinance is not simply constitutionally deficient; it is nonexistent. The Ordinance's enforcement scheme fails to afford any aggrieved party, *i.e.*, employee, employers, landlords or tenants, any due process, either prior to or after ordering the deprivation of protected liberty and property interests. Not only does the Ordinance authorize the Code Office to immediately suspend absent a hearing, a business license, awarded contract, or rental license, but it provides no mechanism for a hearing after the suspension. Further, the Ordinance affords no procedure for an individual branded as an "unlawful worker," or a tenant designated as an "illegal alien," to challenge that determination, notwithstanding its devastating implications. Finally, although the Township under the Ordinance will allegedly verify an individual's immigration status pursuant to 8 U.S.C. §1373, that statute does not establish a verification mechanism, and upon information and belief, Riverside to date has not established a verification system, and no federal agency has entered into an approved verification system that Riverside could use to ascertain the immigration status of individuals alleged to be illegally working or housed in the Township.

Affording an affected tenant or employee, landlord or employer, notice and a meaningful opportunity to challenge an adverse determination before an impartial decision maker is critical to ensure the accuracy and reliability of the decision making process. Businesses and landlords who face the immediate loss of income and right to operate, and tenants and employees who risk the immediate and irreparable loss of shelter and means of livelihood as a result of an erroneous determination and who possess the most critical information relevant to such a determination, should be provided a meaningful opportunity to participate in this process before suffering the serious consequences from it. The Ordinance provides none.

Finally, the burden imposed upon the Township is not so substantial as to justify a denial of minimal due process protections to those persons directly impacted. Since these business entities and landlords have been operating businesses or renting property, and tenants and employees have been living and working in Riverside without incident, some for many years, the Township suffers no harm by affording the impacted persons notice and an opportunity to challenge any adverse finding before an impartial adjudicator prior to discharge from work, or removal from residence, or suspension of business or rental license, or loss of an awarded public contract. On the other hand, harm from an erroneous determination may be long lasting and even life threatening.

The supreme importance of the rights at stake, the arbitrariness that will otherwise pervade the process, and the lack of substantial burden upon the Township, all underscore the serious procedural defects of the existing Ordinance. There is no conceivable justification for the utter lack of procedural protections. By failing to provide meaningful notice and a procedure to challenge any adverse determinations, the Revised Riverside Immigration Ordinance violates basic due process principles under the New Jersey Constitution and the doctrine of fundamental fairness under New Jersey law. For this reason alone, the Ordinance should be enjoined.[26]

V. THE REVISED RIVERSIDE IMMIGRATION ORDINANCE USES IMPERMISSIBLE CLASSIFICATIONS BASED UPON RACE IN VIOLATION OF THE NJLAD AND THE EQUAL PROTECTION PROVISIONS OF ARTICLE I, PARAGRAPH 1 OF THE NEW JERSEY CONSTITUTION.

The Revised Riverside Immigration Ordinance expressly allows the consideration of a person's race to determine whether that person is an "unlawful worker" or "illegal alien" under the

[26]In addition, the Ordinance as drafted, also violates the substantive due process provisions of paragraph I of the New Jersey Constitution, by denying property owners a substantial attribute of ownership of possession of real estate and certain other aspects of the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 *et seq.* However, plaintiffs are not seeking injunction relief upon any of those grounds at present.

Ordinance. Specifically, the Ordinance allows Riverside to consider those classifications as evidence of a violation when determining whether a complaint is valid, as defined by the Ordinance, as long as such evidence is not the primary basis for the complaint. By expressly allowing consideration of a clearly suspect classification in its enforcement scheme, the Revised Riverside Immigration Ordinance violates the anti-discrimination provisions of the NJLAD and the equal protection provisions of the Article I, paragraph 1 of the New Jersey Constitution.

A. The Revised Riverside Immigration Ordinance expressly permits Riverside to use racial classifications as evidence of a violation.

The Revised Riverside Immigration Ordinance contains two parallel, and almost identical, complaint-based enforcement schemes, one to enforce the prohibitions against the employment of "unlawful workers" in the business permit section (§166-5B), and the other to enforce proscriptions against renting to "illegal aliens" in the housing section (§166-5B). The business permit provisions state in part:

> §166-4B. Enforcement: The Township Code Enforcement Officer and Township Police are hereby authorized to enforce and are responsible for enforcing the requirements of this section.
>
> 1. An enforcement action shall be initiated by means of a written signed complaint to the Township Code Enforcement Office or Township Police submitted by any Township official, business entity, or resident. A valid complaint shall include an allegation which describes the alleged violator(s) as well as the actions constituting the violation, and the date and location where such actions occurred.
>
> 2. A complaint which alleges a violation solely or primarily on this basis of national origin, ethnicity, or race shall be deemed invalid and shall not be enforced.
>
> 3. Upon receipt of a valid complaint, the enforcement officials shall, within seven business days, request identity information from the business entity regarding any persons alleged to be unlawful

> workers. The enforcement officials suspend the business permit, grant or contract of any business entity which fails, within three business days after receipt of the request, to provide such information...

As set forth above, an enforcement action is initiated by means of a written signed complaint. If a complaint alleges the requisite information, it is to be considered a valid complaint, and an investigation is then mandated.[27] Riverside must make a request for certain "identity information" and, if the business entity does not respond within three days, Riverside is directed to suspend its business permit indefinitely. The indefinite suspension can occur before a finding of a violation of the Revised Riverside Immigration Ordinance.

Under this Ordinance, Riverside has committed itself to acting on complaints based in part upon race. As long as a complaint's allegation of a violation is *not* "*solely or primarily on the basis of national origin, ethnicity, or race*," the complaint is neither invalid nor unenforceable. *See* Revised Riverside Immigration Ordinance, §§166-4B2 and 5B2. The only other requirements that the Ordinance imposes upon a complaint are that it is signed, that it describes the alleged violators, and date and location of the alleged violation. Accordingly, a complaint based in part on the suspect characteristic of "race," will be considered valid according to the terms of the Ordinance and must be enforced. Indeed, the Ordinance mandates that all valid complaints "shall" be enforced. Revised Riverside Immigration Ordinance §§166-4B3 and 166-5B3.

B. The NJLAD and Equal Protection provisions of Article I,

[27]Though the procedures described are those dealing with allegations of business entities employing unlawful workers as set out in §166-4, the procedures are identical for property owners alleged to have rented to "illegal aliens" under §166-5, including the provision which permits a complaint based in part upon a tenant's race. §166-5B2. However, the investigatory process under §166-4B3 differs from that under §166-5B3. Under the former, the enforcement officers are to seek identity information from the business entity. Under the latter, inexplicably, there is no provision in the Ordinance directing enforcement officials to require property owners to provide identity information of a tenant who is allegedly an "illegal alien," nor anything which describes what information would have to be supplied.

paragraph 1 of the New Jersey Constitution prohibit the use of race as a basis for a violation.

In construing the NJLAD, the New Jersey Supreme Court has long recognized that "freedom from discrimination is one of the fundamental principles of our society." *Lehmann v. Toys R' Us, Inc.*, 132 N.J. 587, 600 (1993). With that bedrock principle in mind, "the overarching goal of the [NJLAD] is nothing less than the eradication 'of the cancer of discrimination.'" *Fuchilla v. Layman*, 109 N.J. 319, 334 (quoting *Jackson v. Concord Co.*, 54 N.J. 113, 124, (1969)), *cert. denied*, 488 U.S. 826 (1988). The NJLAD is the Legislature's attempt to "protect society from the vestiges of discrimination." *Cedeno v. Montclair State Univ.*, 163 N.J. 473, 478 (2000).

Enacted in 1945 as the first state anti-discrimination statute in the nation, the NJLAD ensures "that the civil rights guaranteed by the State Constitution are extended to all its citizens." *Viscik v. Fowler Equip. Co., Inc.*, 173 N.J. 1, 12 (2002) (citing L. 1945, c. 169; N.J.S.A. 10:5-2). The Legislature declared that "discrimination threatens not only the rights and proper privileges of the inhabitants of the State, but menaces the institutions and foundation of a free democratic State . . . [and] that because of discrimination, people suffer personal hardships, and the State suffers a grievous harm." N.J.S.A. 10:5-3. With those legislative underpinnings as a backdrop, the New Jersey Supreme Court has liberally construed the NJLAD to further the Legislature's broad remedial objectives. *See Viscik*, 173 N.J. at 13; *see also* N.J.S.A. 10:5-3 ("[T]his act shall be liberally construed in combination with other protections available under the laws of this State."). New Jersey courts counsel that "the more broad [the LAD] is applied the greater its antidiscriminatory impact." *Ptaszynski v. Uwaneme*, 371 N.J. Super. 333, 345 (App. Div.), *certif. denied*, 182 N.J. 147, 862 (2004).

Underscoring the importance of the antidiscrimination provisions enumerated in the NJLAD,

Article I, paragraph 5 of the New Jersey Constitution specifically forbids the denial of any civil right because of race, color, ancestry, or nation origin, providing in pertinent part:

> No person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of civil or military right . . . because of . . . race, color, ancestry, or national origin.

Classifications or decisions which rely on race are undisputedly inconsistent with the NJLAD. *See* N.J.S.A. 10:5-3; 10:5-12. Not only does such a conclusion comport with the explicit dictates of the NJLAD, it is consistent with its constitutional imperative, and statutory mandate that the "act shall be liberally construed." N.J.S.A. 10:5-3. Riverside can offer no justification, and we can think of none, which would allow race to be utilized as a basis of a valid complaint under the Revised Riverside Immigration Ordinance.

That race is not the sole reason for a complaint filed under the Ordinance is of no moment. Classifications based upon race "are by their very nature odious to a free people whose institutions are founded upon a doctrine of equality." *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). No inquiry into legislative purpose is necessary when the racial classification appears on the face of the enactment. *See, Personnel Administration of Mass. v. Feeney*, 442 U.S. 256, 272 (1979). Where the New Jersey Supreme Court has explicitly described the goal of the NJLAD "as being 'nothing less than the eradication of the cancer of discrimination.'" *Hernandez v. Region Nine Housing Corp.*, 146 N.J. 645, 651-52 (1996), the Revised Riverside Immigration Ordinance's classification based upon race, is the very type of cancer the NJLAD was enacted to excise.

Utilizing a classification based upon race is equally violative of the equal protection provisions under the New Jersey Constitution. New Jersey has long recognized that the "right to be free from discrimination is firmly supported by . . . the protections of Article I, paragraphs 1 and

5 of the New Jersey Constitution of 1947." *State of New Jersey v. Soto*, 324 N.J. Super. 66, 83 (Law Div. 1996). "The eradication of the 'cancer of discrimination' has long been one of our State's highest priorities." *Dixon v. Rutgers*, 110 N.J. 432, 451 (1988).

Although Article I, paragraph 1 of the New Jersey Constitution does not contain the express terms "equal protection of the laws," the New Jersey Supreme Court has "construed the expressive language of Article I, Paragraph 1 to embrace that fundamental guarantee." *Lewis v. Harris*, 188 N.J. 415, 442 (2006); *Caviglia v. Royal Tours of America*, 178 N.J. 460, 472 (2004); *Greenberg v. Kimmelman*, 99 N.J. 552, 568 (1985); *see also Sojourner A. v. New Jersey Department of Human Services*, 177 N.J. 318, 332 (2003). Like the Fourteenth Amendment to the United States Constitution, Article I, paragraph I, "seeks to protect against injustice and against the unequal treatment of those who should be treated alike." *Greenberg*, 99 N.J. at 568. However, unlike the fundamental right or tiered suspect classification analysis utilized under the Fourteenth Amendment,[28] New Jersey has adopted a balancing test. *See, e.g., Caviglia*, 178 N.J. at 472; *Sojourner*, 177 N.J. at 332; *Barone v. Department of Human Services*, 107 N.J. 355, 368 (1987); *Greenberg*, 99 N.J. at 567. That test weighs the "nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction." *Greenberg*, 99

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[28]As the New Jersey Supreme Court explained:

> Conventional equal protection analysis employs 'two tiers' of judicial review. Briefly stated, if a fundamental right or suspect class is involved, the legislative classification is subject to strict scrutiny; the state must establish that a compelling state interest supports the classification and that no less restrictive alternative is available. With other rights and classes, however, the legislative classification need be only rationally related to a legitimate state interest. [*Right to Choose v. Byrne*, 91 N.J. 287, 305 (1982)].

See also, Brown, 113 N.J. at 573 ("If a fundamental right or suspect class is involved, the legislative classification is subject to strict scrutiny . . . which requires that a state further a compelling state interest and that there is no less restrictive means of accomplishing that objective.") (citations omitted).

N.J. at 567; *see also, Barone,* 107 N.J. at 368. New Jersey requires that the means selected by the enacting body "bear a real and substantial relationship to a permissible legislative purpose." *Taxpayers Ass'n v. Weymouth Twp. Inc. v. Weymouth Twp.,* 80 N.J. 6, 44 (1976), *cert. denied,* 430 U.S. 977 (1977).

In applying this test, the New Jersey Supreme Court has emphasized "that the considerations guiding our equal protection analysis under the New Jersey Constitution are implicit in the . . . tier[ed] approach applied by the Supreme Court under the Federal Constitution." *Barone,* 107 N.J. at 368; *Greenberg,* 99 N.J. at 567.

> Both tests consider the nature of the individual rights affected by the governmental action being challenged, the importance of the governmental interests being furthered, and the degree to which the challenged restriction is necessary to achieve those interests. Therefore, the two tests will often yield the same result. [*Barone,* 107 N.J. at 368].

Not surprisingly, the United States Supreme Court has made clear that "all racial classifications [imposed by government] . . . must be analyzed by a review court under strict scrutiny." *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200 (1995) (subcontractor denied contract as result of contract's incentives for hiring disadvantaged subcontractor had standing to seek forward-looking relief against future use of such clauses on equal protection grounds). "Under strict scrutiny, the government has the burden of proving that racial classifications are narrowly tailored measures that further compelling governmental interests." *Johnson v. California,* 543 U.S. 499, 505 (2005) (citing *Adarand Constructors)* (strict scrutiny, rather than "reasonably related to legitimate penological interest" standard, governed inmate's challenge of policy initially placing new inmates with cellmates of same race); *see also Lomack v. City of Newark,* 463 F.3d 303, 307 (3d Cir. 2006) (racial balancing policy in fire department violated equal protection, as racial classifications receive

close scrutiny even if intended to burden or benefit the races equally).

The *Johnson* court explained that *any instance* where the government uses racial classifications is particularly suspect:

> Racial classifications raise special fears that they are motivated by an invidious purpose. Thus, we have admonished time and again that absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining *** what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. We therefore apply strict scrutiny to all racial classifications to 'smoke out' illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool. [*Johnson,* 543 U.S. at 505-06 (citations omitted)].

The use of racial classifications in the administration of justice, as in the instant case, is particularly troublesome.

> Race discrimination is 'especially pernicious in the administration of justice.' And public respect for our system of justice is undermined when the system discriminates based on race. [*Id.* at 511 (citations omitted)].

The New Jersey courts have repeatedly held that use of racial classifications are impermissible and cannot survive scrutiny under either the New Jersey or Federal Constitution in a wide variety of contexts. *See, e.g., State v. Gilmore*, 103 N.J. 508, 522-531 (1986) (invalidated use peremptory challenges to bar jurors on the basis of race, color, ancestry, national origin, sex or religious principles); *L. Feriozzi Concrete Company, Inc. v. Casino Reinvestment Development Authority,* 342 N.J. Super. 237 (App. Div. 2001) (minority set aside program is not narrowly tailored and cannot survive strict scrutiny analysis); *Soto*, 324 N.J. Super. at 83 ("It is indisputable . . . that the police may not stop a motorist based on race or any other invidious classification.").

The Revised Riverside Immigration Ordinance requires the Township to enforce complaints

based in part on race, ethnicity, and/or national origin. The burden falls upon Riverside to establish a compelling governmental interest to justify this scheme, which it absolutely cannot.

Riverside cannot escape strict scrutiny by arguing that the Revised Riverside Immigration Ordinance is racially neutral and does not use race to either benefit or burden the alleged violator. The Court in *Johnson* resoundingly rejected this argument presented on behalf of the California Department of Corrections (CDC):

> The CDC claims that its policy should be exempt from our categorical rule because it is 'neutral' that is, it 'neither benefits nor burdens one group or individual more than any other group or individual.' . . . The CDC's argument ignores our repeated command that 'racial classifications receive close scrutiny even when they may be said to burden or benefit the races equally.' Indeed, we rejected the notion that separate can ever be equal or 'neutral' 50 years ago in *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), and we refuse to resurrect it today. [*Id.* at 507 (citations omitted)].

This constitutional infirmity is not cured by any claim that under the Revised Riverside Immigration Ordinance, race does not serve as the "sole or primary" basis for establishing the validity of a complaint. Recognizing that it is rare to see race as the only factor involved in any challenged practice, the constitutional ban on the use of racial classifications is not evaded, minimized, or absolved simply because there are other factors involved in a process challenged as violating equal protection. *See, e.g., Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 268 (1977) (rarely are legislative or administrative decisions motivated by a single concern). By allowing enforcement of laws based on the race of an individual, the Revised Riverside Immigration Ordinance violates equal protection standards. *See also, Soto,* 324 N.J. Super. at 83; *Christopher v. Nestlerode,* 373 F.Supp. 2d. 503, 519 (M.D. Pa. 2005) ("selective enforcement of laws or regulations, based on race or ethnicity of an individual, may give

rise to a violation of the Fourteenth Amendment," citing *Bradley v. United States*, 299 F.3d 197, 206-07 (3d Cir. 2002) (in selective enforcement claim, passenger failed to prove that customs inspectors treated her differently than other similarly situated passengers)).

By making race a relevant consideration in enforcing the Ordinance, Riverside 'threatens to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility . . . [and] to reinforce racial and ethnic divisions." *Johnson*, 543 U.S. at 507. The potential for aggravating racial hostilities is immense if Riverside residents are permitted to single out other persons for prosecution under the Revised Riverside Immigration Ordinance based upon their race. Riverside cannot establish any compelling need to impose such a system nor demonstrate that it is narrowly tailored to further any legitimate governmental objective. The New Jersey Constitution does not permit such a scheme to govern and neither should this Court.

By explicitly permitting race to be used as a basis for a complaint, the Revised Riverside Immigration Ordinance utilizes an impermissible classification in violation of the NJLAD and/or the equal protection provisions of Article I, paragraph I of the New Jersey Constitution. For those reasons alone, the Ordinance is invalid.

CONCLUSION

"Give me your tired, your poor, Your huddled masses yearning to breathe free, The wretched refuse of your teeming shore, Send these, the homeless, tempest - tossed, to me: I lift my lamp beside the golden door."[29] This is meant to be more than just an inscription on the Statute of Liberty. It is a beacon to the nations of the world and the bedrock foundation upon which this country was built and enriched. Predicated upon irrational fear, prejudice and xenophobia, the Revised Riverside

[29]Emma Lazarus, "The New Colossus."

Immigration Ordinance is designed to rip that foundation asunder and to exclude those whom Lady Liberty previously welcomed with open arms. For all of the foregoing reasons, plaintiffs respectfully request that this Court find the Revised Riverside Immigration Ordinance unlawful and invalid, and grant plaintiffs' application for injunctive relief, permanently enjoining the ordinance in its entirety.

Respectfully submitted,

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